Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-544

BLUE CROSS OF WESTERN PENNSYLVANIA,
a non-profit Corporation,
Petitioner
v.
HONORABLE RABE F. MARSH,
United States District Judge,
Nominal Respondent
(ALMA COLES, an individual),
Real Party In Interest-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

BLUE CROSS OF WESTERN PENNSYLVANIA,
a non-profit Corporation,
Petitioner
v.
HONORABLE RABE F. MARSH,
United States District Judge,
Nominal Respondent
(ALMA COLES, an individual),
Real Party In Interest-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 28, 1977.

OPINIONS BELOW

The Order of the United States District Court for the Western District of Pennsylvania dated December 17, 1976, together with a letter written by the District Judge dated March 7, 1977 setting forth the grounds for entering said order are printed in Appendices A and B hereto, respectively, (pp. 1a-5a),[1] and both of which

are unreported. The Opinion of the United States Court of Appeals for the Third Circuit, filed on July 28, 1977, pursuant to which said court of appeals issued a writ of mandamus directing the vacating of the said district court order is printed in Appendix C hereto (pp. 6a-13a) and is also as yet unreported.

JURISDICTION

The judgment of the court of appeals, consisting of an Order and a Writ of Mandamus was entered on July 28, 1977 and is printed in Appendix D hereto (pp. 14a-16a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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1. Reference to pages of the Appendices hereto shall be cited as Appendix ..... (pp. .....).

QUESTIONS PRESENTED

1. During the pendency of a class action, does a United States District Court possess the power to enter a protective order prohibiting certain communications between a plaintiff class representative or her attorney and certain third parties, including potential members of the class and civil rights organizations, in order to prevent actual and potential abuses of the class action device?

2. Where actual abuses of the class action device have been demonstrated to a United States District Judge, is it improper for a court of appeals to issue a writ of mandamus against such district judge requiring him to vacate a protective order prohibiting certain communications during the pendency of a class action between plaintiff class representative or her attorney and certain third parties, including potential members of the class and civil rights organizations, in order to prevent such actual abuses and certain potential abuses of the class action device?

STATUTES AND FEDERAL RULES INVOLVED

The statute granting the court of appeals power to issue the writ of mandamus directing a United States District Judge to vacate a protective order is 28 U.S.C. §1651(a), the text of which is printed in Appendix E hereto (p. 17a). The rules which Petitioner contends empowers a United States District Judge to enter a protective order such as the one at issue in the instant proceeding are Rules 83 and 23(d) of the Federal Rules of Civil Procedure. These rules are printed in Appendix F hereto (pp. 18a-21a).

STATEMENT OF THE CASE

I. Proceedings in the District Court

Real Party In Interest-Respondent Alma Coles, a black female, ("Mrs. Coles") commenced a civil action in the United States District Court for the Western District of Pennsylvania by filing a Complaint against Petitioner Blue Cross of Western Pennsylvania ("Blue Cross") on or about August 27, 1976. In her Complaint Mrs. Coles alleged that Blue Cross discriminated against her with respect to her employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. Mrs. Coles brought the action as a class action seeking declaratory and injunctive relief for herself and members of her putative class. On September 15, 1976, Blue Cross noticed the taking of the oral deposition of Mrs. Coles, pursuant to the applicable provisions of the Federal Rules of Civil Procedure. Said oral deposition commenced on September 27, 1976 and concluded on October 11, 1976, taking place on six separate days. During the course of Mrs. Coles' deposition, she testified under oath that she (i) had contacted and would continue to contact present or former employees of Blue Cross and certain other individuals who never had a relationship with Blue Cross with the hope of interesting them in participating in the suit; (ii) had contacted the National Association for the Advancement of Colored People and proposed to contact other organizations, including other civil rights organizations, for the purpose of enlisting their support including financial support to partially defray litigation expenses; and (iii) had contacted a radio programmer whom she hoped would help in any way he could, possibly by providing advertising for her case. Mrs. Coles admitted that her attorney was

aware of, but did not seek to restrict, her efforts to communicate with the aforementioned persons and organizations.[2]

In response to discovery of such circumstances, Blue Cross filed a Motion for Protective Order on or about October 14, 1976 and then filed an Amended Motion for Protective Order with the district court on November 3, 1976, superseding the original motion. On December 17, 1976 the district court issued the protective order in dispute herein (the "Protective Order") which is reproduced in Appendix A hereto (pp. 1a-3a) as aforesaid.

On February 4, 1977 the district court issued an Opinion and Order declining to treat the action as a class action and postponing a final decision on the class action issue until after the trial on the merits of Mrs. Coles' individual civil rights claim.[3]

II. Proceedings in the Court of Appeals

On or about February 18, 1977 Mrs. Coles filed a Petition for Writ of Mandamus/Prohibition And/Or Supervisory Writ of Mandamus/Prohibition requesting, inter alia, the court of appeals to order the district court to vacate the Protective Order. After briefs were filed and argument held, on July 28, 1977 the court of appeals issued a writ of mandamus directing the district court to vacate the Protective Order, which directive the district

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2. Excerpts from Mrs. Coles' oral deposition are printed in Appendix G hereto (pp. 22a-38a).

3. The text of said Opinion and Order of February 4, 1977 is printed in Appendix H hereto (pp. 39a-43a).

court promptly obeyed.[4] In the meantime, trial on the merits of Mrs. Coles' individual civil rights claim proceeded to conclusion in the district court, although no decision on such trial has yet been rendered.[5]

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4. Judge Marsh issued an Order on August 3, 1977 vacating the Order entered on December 17, 1976. Because he coincidentally entered two orders on December 17, 1976 in this case, Judge Marsh entered an Order on September 6, 1977 clarifying the fact that he intended to vacate only the Protective Order. Both the said August 3, 1977 and September 6, 1977 Orders are printed in Appendix I hereto (pp. 44a-45a).

5. Mrs. Coles was discharged as an employee of Blue Cross effective May 13, 1977 by reason of her unsatisfactory performance and productivity. On July 11, 1977 Mrs. Coles filed a motion for a temporary restraining order seeking reinstatement to her position with Blue Cross. After a hearing on her motion for a temporary restraining order and a preliminary injunction hearing, the district court denied Mrs. Coles' request for *pendente lite* relief for failure to make the requisite showing as to irreparable injury.

REASONS FOR GRANTING THE WRIT

This Petition raises substantial and important questions concerning the administration and proper conduct of class actions at the district court level and the power of district courts to prevent actual and potential abuses of the class action device under Rules 83 and 23 of the Federal Rules of Civil Procedure. This Court has not passed upon such issue to date. Moreover, the Opinion of the court of appeals below is in conflict with a decision of the United States Court of Appeals for the Second Circuit in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int., Inc.,* reported at 455 F.2d 770 (2d Cir. 1972), the text of which is printed in Appendix J hereto (pp. 46a-54a), is also in conflict with a number of cases at the district court level in other circuits, and is particularly in conflict with the recent federal decision of *Waldo v. Lakeshore Estates Inc.,* reported at 433 F.Supp. 782 (E.D. La. 1977), the text of opinion of which is printed in Appendix K hereto (pp. 60a-80a).

I. The Decision of the Court of Appeals Constitutes an Important Question of Federal Law Which has Not Been, but Should be, Settled by this Court

The Protective Order was entered after it was demonstrated to the district court that Mrs. Coles was attempting to recruit additional parties plaintiff and was soliciting financial assistance to maintain the class action. The substance of the Protective Order, which the court of appeals ordered to be vacated by issuing its writ of mandamus, was taken verbatim from 1 (pt. 2) J. Moore, Manual For Complex Litigation, Part II — App., Para. 1.41 at 189, Sample Pre-trial Order No. 15, prepared by a committee under the auspices of the Federal

Judicial Center. The court of appeals has thus rejected the recommendations of the Manual for Complex Litigation on the grounds that the district court lacked the power to enter such an order. The court of appeals specifically held at page 6 of its opinion as follows:

> "We hold . . . that the district court lacked power to impose any restraint on communication for the purpose of preventing the recruitment of additional parties plaintiff or of the solicitation of financial or other support to maintain the action." (p. 12a)

The decision of the court of appeals was based upon the authority of an earlier decision of the Third Circuit in *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir. 1975), cert. denied, 423 U.S. 832 (1975). Although this Court denied a writ of certiorari to review the *Rodgers* decision, it is respectfully submitted that it is appropriate to grant a writ of certiorari in this case. The *Rodgers* decision merely invalidated a local rule of the United States District Court for the Western District of Pennsylvania which prohibited any communication by any of the parties or their counsel with any potential or actual class member who was not a formal party to the action until such time as an order may be entered by the court approving the communication. The court of appeals concluded that the local rule in question was outside the local rule-making authority granted to district courts under Federal Rule 83.

In the instant case the Protective Order was not premised on the local rule abrogated by the *Rodgers* decision, but on the omnibus sentence of Rule 83 of the Federal Rules of Civil Procedure, which provides that "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules" (p. 21a), as well as on Rule 23 itself which provides a district court with power to issue rules in the conduct of class actions (pp. 18a-21a).

In holding that the district court lacked the power to impose any restraint on communication for the purpose of preventing the recruitment of additional parties plaintiff or the solicitation of financial or other support to maintain the action, the court of appeals concluded that the admitted recruiting and soliciting activities of Mrs. Coles[6] were not abuses of the class action device, but merely violations of ethical norms traditionally accepted in the legal profession which make it improper, if not criminal, for a layman or his attorney to excite the interest of others in bringing suit or to accept money or assistance in prosecuting or defending a suit. The court of appeals below therefore held that there was no basis for any protective order in the instant case (pp. 11a-13a).

The decision and reasoning of the court of appeals below is not only diametrically opposed to the suggestions set forth in the Manual For Complex Litigation, but also to the decisions of numerous district courts handed down over the last decade. See *Brown v. Gillette Co.*, 21 F.R.Serv. 2d 372 (D. Mass. 1975); *DiCostanzo v. Chrysler Corp.*, 15 F.R.Serv. 2d 1248 (E.D. Pa. 1972); *Sayre v. Abraham Lincoln Federal Savings & Loan Association*, 65 F.R.D. 379 (E.D. Pa. 1974); *Local 374 Bakery Drivers Pension Fund Trust v. Continental Illinois National Bank and Trust Co. of Chicago*, 57 F.R.D. 1 (N.D. Ill. 1972); *Vance v. Fashion Two Twenty, Inc.*, 16 F.R.Serv. 2d 1513 (N.D. Ohio 1973); *Chrapliwy v. Uniroyal Inc.*, 12 E.P.D. ¶11,055 (N.D. Ind. 1976); *Merit*

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6. See excerpts taken from Mrs. Coles' deposition printed in Appendix G hereto (pp. 22a-38a).

Motors, Inc. v. Chrysler Corp. and National Automobile Dealers Assn., C.A. No. 2000-70, filed December 20, 1972 (D.D.C. 1972); *American Finance System, Inc. v. Pickrel*, 18 F.R.Serv.2d 292 (D.Md. 1974); and *Waldo v. Lakeshore Estates, Inc.*, supra.

Of particular interest in this regard is the well-reasoned opinion of the United States District Court for the Eastern District of Louisiana in the recent case of *Waldo v. Lakeshore Estates*, supra.[7] That court upheld both the validity and constitutionality of one of its local rules which was also taken verbatim from the Manual For Complex Litigation. A comparison of the Louisiana district court's opinion with the opinion of the Third Circuit in the instant case particularly illustrates a completely opposite approach to the question of the extent of the power of district courts to control actual and potential abuses of the class action device, including actual and potential unethical conduct. The text of the local rule upheld by the court in *Waldo* and the order struck down by the Third Circuit in the instant suit are virtually identical.

It should also be noted that the Harvard Law Review has discussed some of these vital issues at length in a case Note at 88 Harv. L. Rev. 1911 (1975) and in Note, "Developments in the Law — Class Actions", 89 Harv. L. Rev. 1318, 1597-1604 (1976).

This Honorable Court in the past has recognized the importance of settling questions of federal law involving the Federal Rules of Civil Procedure and powers granted to federal courts thereunder. *Schlagenhauf v. Holden*, 379 U.S. 104 (1964); *La Buy v. Howes Leather Co.*, 352

7. The text of the *Waldo* opinion is printed in Appendix K hereto (pp. 60a-80a).

U.S. 249 (1957). It is therefore respectfully submitted that it is appropriate for this Honorable Court to grant a writ of certiorari in this case because of the involvement herein of an important question of federal law which has not been, but should be settled by this Honorable Court.

II. The Decision of the Court of Appeals is in Conflict with the Decision of Another Court of Appeals on the Same Matter

The court of appeals below has rendered a decision in conflict with the decision of the United States Court of Appeals for the Second Circuit in the same matter — the power of district courts to regulate communications of parties during the course of class actions. In *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int., Inc.*, supra,[8] the Second Circuit refused to issue a writ of mandamus requiring a district court to vacate an order which permitted, under limited circumstances, communications between formal parties to a class action and their attorneys and members of the class who were not formal parties to the action. The district court below in *Weight Watchers* entered an order in the form suggested by the then current edition of the Manual For Complex Litigation, Sample Pretrial Order 15, prohibiting the formal parties from communicating with non-party class members without court approval, and the district court later modified such order by permitting limited communications in the form of contract negotiating sessions initiated and requested *only* by the non-formal party class members to take place under extremely lim-

8. The text of the opinion of the Second Circuit in *Weight Watchers* is printed in Appendix J hereto (pp. 46a-54a).

ited circumstances and subject to specific conditions.[9] In refusing to issue a writ of mandamus the Second Circuit held at 775 that the subject order "was well within the wide range of discretion in the management of class actions necessarily accorded the district judge by F.R. Civ.P. 23(d)" (p. 54a).

It is submitted that the orders of the district court in the *Weight Watchers* case were severely more restrictive then the Protective Order entered by the district court in the case at bar. It is important to note that the *Weight Watchers* orders, while prohibiting communications with non-party class members, did not expressly permit any communications protected by a constitutional right, whereas the Protective Order in the case at bar expressly permits, inter alia, any communication protected by any constitutional right. The Second Circuit in *Weight Watchers* has held that such a protective order may be entered pursuant to the power granted by Rule 23(d) of the Federal Rules of Civil Procedure, while the Third Circuit in the instant case at page 6, footnote 2 of its Opinion, (p. 11a), has decided precisely the opposite

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9. Attorneys for Blue Cross have endeavored to obtain copies of the orders entered by the district court in the *Weight Watchers* case first by contacting the office of the Clerk of Courts for the United States District Court for the Eastern District of New York, whose office informed attorneys for Blue Cross that although the relevant docket reflected entries noting the entry of such orders, the orders themselves were deposited in their archives and were difficult to retrieve. Attorneys for Blue Cross therefore contacted Michael Malina, Esquire of the law firm of Kaye, Scholer, Fiernan, Hays & Handler, counsel for defendant-appellee in the *Weight Watchers* case. The orders printed in Appendices J-1 and J-2 (pp. 55a-59a) were supplied by Mr. Malina as the exact text of the orders in question entered by the district court.

— that Rule 23 provides no source of power for the imposition of such an order.

In the past, this Honorable Court has held it proper to issue writs of certiorari to resolve conflicts in decisions among the circuits. *United States v. Muniz,* 374 U.S. 150 (1963); *Bingler v. Johnson,* 394 U.S. 741 (1969); *United States v. O'Malley,* 383 U.S. 627 (1966); *Avco Corp. v. Aero Lodge,* 390 U.S. 557 (1968); *Northeastern National Bank v. United States,* 387 U.S. 213 (1967). It is therefore respectfully submitted that two circuit courts of appeals have ruled inconsistently on the same or similar issues, making it appropriate for a writ of certiorari to issue for the Supreme Court of the United States to review this important question of federal law.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Blue Cross of Western Pennsylvania

APPENDIX

Appendix A — Order of the United States District Court for the Western District of Pennsylvania Dated December 17, 1976

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALMA COLES, Plaintiff v. BLUE CROSS OF WESTERN PENNSYLVANIA, Defendant	Civil Action No. 76-1097 Class Action

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ORDER

AND NOW, this 17th day of December, 1976, upon motion of the Defendant, it is hereby

ORDERED, that Plaintiff, Alma Coles, and her attorney, Clifford C. Cooper, Esquire, are prohibited directly or indirectly, orally or in writing, from contacting, soliciting or communicating with any potential or actual class member who is not a formal party to this suit, including but not limited to Diane Bey, Lois Broadus, Joyce Lang, Joyce Deas, Marlene Ramsey, Marcia Smith, June Pickett, Judy Harris, Barbara Davis, the local chapter of the NAACP, its officers, members and Board, the Direct Action Coalition, the National Organization of Women (N.O.W.) and Women in Urban Crises, for the purposes of, but not limited to:

a. Solicitation, directly or indirectly, of legal representation of potential and actual class members who are not formal parties to this action;

b. Solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action;

c. Solicitation by Plaintiff and her counsel to the class action of requests by class members to opt out of class actions under subparagraph (b) (3) of Rule 23, Federal Rules of Civil Procedure; and

d. Communications from counsel or party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this court, or the administration of justice.

It is further Ordered that the following activities are not prohibited by this Order:

a. Communications between Plaintiff's attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney;

b. Communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel or misrepresenting the status, purposes or effect of the action and orders therein; or

c. Any communications protected by any constitutional right.

And further, in the foregoing three instances the person making the communication shall within five days after such communication file with this Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral. The obligations and prohibitions of this Order are not exclusive. All other ethical and legal obligations are unaffected by this Order.

BY THE COURT:

RABE MARSH, J.

United States District Judge

Appendix B — Letter of United States District Judge Pursuant to Rule 21, Federal Rules of Appellate Procedure dated March 7, 1977

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

837 UNITED STATES COURTHOUSE
PITTSBURGH, PA. 15219

CHAMBERS OF
RABE F. MARSH, JUDGE
March 7, 1977

United States Court of Appeals
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pa. 19106

Re: Alma Coles, Petitioner vs.
Hon. Rabe F. Marsh, etc.
No. 77-1235
(D.C. Civil No. 76-1097)

Dear Mr. Quinn:

I have been named as respondent in the above captioned action which concerns a protective order entered on December 17, 1976. No opinion was issued at that time, and the oral argument of December 16 was not recorded (a court reporter was present at the beginning of the argument, but the parties chose to proceed without a record). Therefore, in an effort to facilitate review, I believe I should advise the Court that the pro-

tective order of December 17 was entered after thorough consideration of the following:

Defendant's Amended Motion for a Protective Order and plaintiff's Answer thereto;

Portions of the deposition of plaintiff Alma Coles as submitted by defendant, specifically: Vol. I, pp. 187-198; Vol. III, p. 91; Vol. IV, pp. 71-75; Vol. VI, pp. 115-116, 154-160;

Plaintiff's failure to present any evidence in mitigation of the admitted efforts by the plaintiff, since the filing of the complaint, to recruit additional parties for the class action;

The decision in *Rodgers v. United States Steel Corporation,* 508 F. 2d 152 (3rd Cir. 1975);

The *Manual for Complex Litigation,* Part I, § 1.41, Preventing Potential Abuse of Class Action; and Part II, Appendix, § 1.41, Sample Pretrial Order No. 15;

A law review case note submitted by the plaintiff (88 Harv.L. Rev. 1911 (1975)).

Having offered this information, I wish to advise you, pursuant to Rule 21(b) of the Federal Rules of Appellate Procedure, that I do not desire to appear further in the proceeding.

Sincerely,

RABE F. MARSH

Appendix C — Opinion of the United States Court of Appeals for the Third Circuit Dated July 28, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1235

ALMA COLES,
Petitioner

v.

HONORABLE RABE F. MARSH,
United States District Judge,
Nominal Respondent

BLUE CROSS OF WESTERN PENNSYLVANIA,
Respondent

(D.C. Civil No. 76-1097)

ON PETITION FOR A WRIT OF MANDAMUS/PROHIBITION AND/OR SUPERVISORY WRIT OF MANDAMUS/PROHIBITION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 5, 1977
Before SEITZ, *Chief Judge*, ROSENN, *Circuit Judge*, and LORD, *District Judge**.

---

*Joseph S. Lord, III, Chief Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT
(Filed July 28, 1977)

SEITZ, *Chief Judge.*

Petitioner is a plaintiff in the district court who brought suit on behalf of herself and others similarly situated against her employer, Blue Cross of Western Pennsylvania, alleging that it was guilty of discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The district judge, at defendant's request, entered an order on December 17, 1976 prohibiting certain communications between plaintiff or her attorney and certain third parties including potential members of the class and civil rights organizations. Plaintiff petitions this court pursuant to 28 U.S.C. § 1651(a) to issue a writ of mandamus directing the district court to vacate the December 17 order among others.[1]

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1. Petitioner also requested that the writ be issued to vacate an order postponing a deposition and an order setting a trial date. We conclude that these orders properly are not reviewable under the extraordinary writ.

Appendix C.

In *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975), we invalidated Rule 34(d) of the Local Rules of the District Court for the Western District of Pennsylvania. That rule provides:

> (d) No communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an order may be entered by the Court approving the communication.

Rule 34(d) could be applied, and in *Rodgers* was applied, to regulate communication on the part of a plaintiff seeking class action status or his attorney with third persons including potential members of the class at a time when class status had not been granted. Inquiring whether this rule was within the rulemaking authority granted by Fed. R. Civ. P. 83, we said that "[w]e must take into account that the reason urged for applying the prohibition on communication is, in the words of the district court, the prevention of "barratry." 508 F.2d at 163. We said that "[t]here is no general grant of legislative authority to regulate the practice of law," and that "[t]here is no federal common law offense of barratry." Concluding that it would be inconsistent with Fed. R. Civ. P. 23 to prohibit communications designed to encourage common participation in a lawsuit, we held that the Local Rule, at least to the extent that it permitted prohibition of such communication prior to the class determination, was outside of the authority granted under Fed. R. Civ. P. 38.

Since in the instant case the December 17 order postdated our decision in *Rodgers*, it was premised not on

Appendix C.

Local Rule 34(d), which *Rodgers* abrogated and which has not been amended subsequently, but on the omnibus sentence of Fed. R. Civ. P. 83 which provides that "[i]n all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." Thus, as in *Rodgers*, we must consider whether Rule 83 empowers the district court to prohibit communications at a time prior to the class determination.

The substance of the December 17, order is taken verbatim from 1 (pt. 2) J. Moore, *Manual For Complex Litigation*, Part II-App., Para. 1.41 at 189, Sample Pretrial Order No. 15, prepared by a committee under the aegis of the Federal Judicial Center. The order provides:

> ORDERED, that Plaintiff, Alma Coles, and her attorney, Clifford C. Cooper, Esquire, are prohibited directly or indirectly, orally or in writing, from contacting, soliciting or communicating with any potential or actual class member who is not a formal party to this suit, including but not limited to Diane Bey, Lois Broadus, Joyce Lang, Joyce Deas, Marlene Ramsey, Marcia Smith, June Pickett, Judy Harris, Barbara Davis, the local chapter of the NAACP, its officers, members and Board, the Direct Action Coalition, the National Organization of Women (N.O.W.) and Women in Urban Crises, for the purposes of, but not limited to:
>
> a. Solicitation, directly or indirectly, of legal representation of potential and actual class members who are not formal parties to this action;
>
> b. Solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action;

c. Solicitation by Plaintiff and her counsel to the class action of requests by class members to opt out of class actions under subparagraph (b) (3) of Rule 23, Federal Rules of Civil Procedure; and

d. Communications from counsel or party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential court orders therein, which may create impressions tending without cause, to reflect adversely on any party, any counsel, this court, or the administration of justice.

It is further Ordered that the following activities are not prohibited by this Order:

a. Communications between Plaintiff's attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney;

b. Communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel or misrepresenting the status, purposes or effect of the action and orders therein; or

c. Any communications protected by any constitutional right.

And further, in the foregoing three instances the person making the communication shall within five days after such communication file with this Court a copy of such communications, if in writing, or an accurate and substantially complete summary of the

communication if oral. The obligations and prohibitions of this Order are not exclusive. All other ethical and legal obligations are unaffected by this Order.

The justification for this order is that it will ameliorate potential abuses of the class action. The defendant's motion for the order was based upon plaintiff's deposition testimony in which she indicated that she had contacted and would continue to contact present or former employees of Blue Cross with the hope of interesting them in participating in the suit. Moreover, plaintiff had contacted the National Association for the Advancement of Colored People and proposed to contact other organizations for the purpose of enlisting their support including financial support to partially defray litigation expenses. She further testified during the deposition that she had contacted a radio programmer whom she hoped would help in any way he could, possibly by providing advertising. Plaintiff admitted that her attorney was aware of, but did not seek to restrict her efforts to communicate with the aforementioned persons and organizations.

We do not accept the idea expressed by defendant that plaintiff's activities represent abuses of the class action device. Rather, plaintiff's activities were directed toward effectuating the purposes of Rule 23 by encouraging common participation in the litigation of her sex/race discrimination claim.[2] The activities were not abuses of the class action device but, at least arguably, violations of ethical norms traditionally accepted in the

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2. This conclusion disposes of respondent's argument that Rule 23(d) provides a source of power for the imposition of the order apart from the power granted under the omnibus sentence of Rule 83.

legal profession which make it improper, if not criminal, for a layman or his attorney to excite the interest of others in bringing suit or to accept money or assistance in prosecuting or defending suit. We hold, on the authority of *Rodgers, supra,* that the district court lacked power to impose any restraint on communication for the purpose of preventing the recruitment of additional parties plaintiff or of the solicitation of financial or other support to maintain the action.

Of the four provisions restricting communication in the December 17 order, paragraphs a and b clearly are concerned with potential abuses of ethical norms rather than of the class action device and, thus, under *Rodgers,* the district court lacked power to impose them. Paragraphs c and d, on the other hand, conceivably could be used to further the policies of Rule 23 in a proper case. Neither is justified in this case, however.

Paragraph c is inapplicable since plaintiff brought this action under (b)(2), not (b)(3). Moreover, there is simply no basis in this record to believe that plaintiff would be interested in such a course of conduct. Similarly, with respect to paragraph d, defendant's motion for protective order is devoid of specific reference to possible prejudice to it in defending the action which would require protection.

We hold that to the extent that the district court is empowered under Rule 83 to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened. Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties. Imposition of an order on anything less than a clear showing of particularized need removes it from the area of discretion unreviewable by mandamus.

Because there is no basis for entering any protective order in this case, we are not called upon to consider whether a protective order consistent with Rule 23 would comport with constitutional guarantees.

The writ will be granted directing the district court to vacate its order of December 17, 1976.[3]

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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3. We reject respondent's contention that, under the circumstances of this case, the equitable doctrine of laches bars the issuance of the writ.

Appendix D — Order of the United States Court of Appeals for the Third Circuit and Writ of Mandamus filed July 28, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1235

ALMA COLES,
Petitioner

vs.

HONORABLE RABE F. MARSH,
United States District Judge,
Nominal Respondent

BLUE CROSS OF WESTERN PENNSYLVANIA,
Respondent

Present: SEITZ, Chief Judge and ROSENN, *Circuit Judge* and LORD, *District Judge**

Upon consideration of the petition for Writ of Mandamus, of the Answer of Respondent and the briefs.

It is ORDERED, ADJUDGED AND DECREED by this Court that the prayer of the petition be and the same hereby is granted and the Clerk of this Court is hereby directed to issue the Writ of Mandamus in accordance with the opinion of this Court.

BY THE COURT,
COLLINS J. SEITZ
Chief Judge

Dated: July 28, 1977

*Joseph S. Lord, III, Chief Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1235

ALMA COLES,
Petitioner

vs.

HONORABLE RABE F. MARSH,
United States District Judge,
Nominal Respondent

BLUE CROSS OF WESTERN PENNSYLVANIA
Respondent

WRIT OF MANDAMUS

UNITED STATES OF AMERICA, THIRD JUDICIAL CIRCUIT SS.
To the Honorable Rabe F. Marsh, Senior Judge of the District Court for the Western District of Pennsylvania, GREETINGS:

Whereas the Honorable Rabe F. Marsh by order dated December 17, 1976, prohibited petitioner directly or indirectly, orally or in writing, from contacting, soliciting or communicating with any potential or actual class member who was not a party to the instant cause of action including certain named potential members of the class and civil rights organizations; and

Whereas Alma Coles, Petitioner in the above-entitled case in this United States Court of Appeals for the

Third Circuit, filed, on February 18, 1977, a petition for a writ of mandamus to the Honorable Rabe F. Marsh, requesting this Court to direct the said Honorable Rabe F. Marsh to vacate his order of December 17, 1976, and filed a supporting brief thereto; and

Whereas respondent herein has filed an answer and supporting brief on March 4, 1977; and

Whereas after due deliberation thereon this Court rendered its opinion and the same was filed this day, in which this Court directed that the prayer of the petition be granted; and

Whereas this Court, on this date has entered an order directing the Clerk of this Court to issue a writ of mandamus in accordance with the opinion of this Court filed herein;

Now Therefore The Honorable Rabe F. Marsh is Hereby Required and Directed, immediately after receipt of this writ, and without unreasonable delay to vacate his order of December 17, 1976. Costs are taxed against respondent.

THOMAS P. QUINN
Clerk of the United States
Court of Appeals for the
Third Circuit

Dated: July 28, 1977

Appendix E — Pertinent Text of Statute Involved

THE ALL WRITS STATUTE
(28 U.S.C. §1651(a))

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§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Appendix F — Pertinent Text of Federal Rules Involved

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23.

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice

shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 83.

RULES BY DISTRICT COURTS

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Appendix G — Excerpts from Oral Deposition of Real Party in Interest — Respondent taken September 27, 1976, October 1, 1976, October 5, 1976 and October 11, 1976

VOLUME I—September 27, 1976

[187] *By Mr. Friedman*:

Q. And what did she say to you?
A. She asked me had I heard what had happened? And she went on to tell me what had happened.
Q. Do you know anything about this termination? What did she tell you?
A. She said that she had, the night before she left, there was a sign-out sheet in her area—
Q. What night was that; do you recall?
A. The night before she was fired. I can't remember the date.
Q. It was in September of '76?
A. Yes.
Q. Within the last couple of weeks?
A. Yes, and she said that she had signed out a sheet to indicate that she wouldn't come directly into her area but go into the area that she was assigned to. And the other part that she gave me was so confusing, I really could not speak to it, you know, clear enough to discuss it with you.
Q. Why would she call you?
A. Well, she and I were friends, and then she's [188] involved in the Class.
Q. She is? What do you mean by that?

Mr. Cooper: She's going to be—

Mr. Friedman: Just a minute. Let her answer.

By Mr. Friedman:

Q. What do you mean, she's invoved in the Class?
A. Well, she was going to participate in the Class.
Q. And when was the last time you discussed her participation in the Class with Miss Bey, B-e-y; when was the last time you discussed that?
A. We didn't discuss it during the time that she had called me.
Q. Well, did you discuss it prior to that with her?
A. I had lunch with her the Tuesday before she was terminated.
Q. Is that also in September of 1976?
A. Yes.
Q. And did you discuss her joining the Class at that time?
A. I discussed it somewhat. She had discussed it with me about handing in a letter of resignation, and I was telling her, you know, why would she hand in a letter [189] of resignation? And she said that she was under a lot of stress from what had gone on prior in her department and that she had said that she wanted to go to graduate school. And I had asked her, why not wait until the first of the year to quit, because there's three pays in October, and you get a bonus in November, and a cost-of-living in December, so that was enough to stay right there, if she wasn't going to graduate school until January.
Q. What did that have to do with her joining the Class?
A. I don't understand.
Q. Well, you testified earlier that she was a possible member of the Class Action.
A. Member of the Class Action?

Q. It's the Class Action we're talking about; is that correct?
A. Yes, simply because she felt that she had been discriminated against.
Q. When is the last time you talked about her joining the Class for this Class suit?
A. I talked to her briefly the Tuesday before she was terminated, when we were out to lunch.
[190] Q. And what was the substance you discussed involving joining the Class Action?
A. I can't really recall the whole detail, but it was not—our basic subject was not on joining the Class.
Q. Well, what about joining the Class did you discuss with her on that Tuesday?
A. I just told her that it seemed to be a pattern of Blue Cross, when they get minorities, black women, there's some kind of harrassing technique or demeaning technique to get you into a position to quit.
Q. And did you ask her if she would like to join the Class at that time, to join the Class suit with you?
A. At that time?
Q. Yes.
A. No, I had asked her before.
Q. When did you ask her to join the Class suit?
A. The date, I can't remember.
Q. Well, can you remember what month it was?
A. The month that I decided to file my suit.
Q. Was that in August of 1976?
A. Can I ask my attorney?
Q. I'd like to have your own knowledge, to the best [191] of your recollection.
A. I filed the suit the end of August—I believe it was the end of August.
Q. And did you ask her to join you at that time?

A. We had discussed it, yes.
Q. And what was the substance of your discussion?
A. I related that it was just discrimination against black women.
Q. Where did you discuss it with her?
A. Where did I discuss it with her?
Q. Yes.
A. Over my home telephone.
Q. At night?
A. Yes.
Q. How often have you discussed it with her? How often did you discuss the potentiality of her joining your Class Action?
A. I think I discussed it with her on about three times.
Q. During the month of August of 1976, or earlier?
A. Probably during the first part of August, '76.
Q. And has Diane Bey joined your Class Action yet?
A. I don't know if—what's she's doing as far as—

[192] *Mr. Cooper*: I don't think she's qualified to answer that question. I don't think she knows.

By Mr. Friedman:

Q. If you know. If you don't know, then you don't know. Do you know whether or not her name is on your Complaint?
A. I signed my own Complaint by myself.
Q. Is her name on your Complaint?
A. I didn't see it when I signed it.

Mr. Friedman: Do you have a copy of the Complaint that was filed?

Mr. Cooper: Sure.

Mr. Friedman: Can we get it out for a second?

Mr. Cooper: No, her name was not on it.

By Mr. Friedman:

Q. Is her name on it?
A. It says Alma Coles, Plaintiff, versus Blue Cross.
Q. Is Diane Bey's name on that?
A. You mean up here?
Q. Anywhere in that document.
[193] A. No, it's not.
Q. Is Diane Bey's name on that document?
A. I couldn't see it as I skimmed through it. I didn't see her name.
Q. But it is your testimony that you recollect talking with her in the last two weeks on Tuesday prior to her termination of employment with Blue Cross regarding her joining this Class Action; is that correct?
A. We discussed, for a few minutes, as far as the Class Action is concerned, but our main conversation dealt with that she was saying that she was going to hand in her resignation. And we had lunch together, and we went down to Horne's and walked around into a couple other different places and just talked.
Q. Have you discussed with any other potential Class members joining this Class Action?
A. I don't know if I should—

Mr. Cooper: Answer the question

A. (Continuing) Answer it? Yes, I have talked to other people.
Q. Why don't we just—can I just hear the names of everyone who you feel is a potential Class member whom you discussed this Class Action or possible joining the [194] Class with?
A. I've discussed it with Joyce Lang, who was a previous employee.

Q. Joyce, L-a-y-n-e?
A. No, L-a-n-g, Joyce Lang.
Q. And is she a black female?
A. Yes.
Q. Anyone else?
A. She, in turn, was going to call some other people who were previously employed here.
Q. And when was the last time you talked to Joyce Lang about joining the Class Action?
A. I talked to Joyce—it's been awhile since I have talked to Joyce. I can't remember the date. I was out one day, and she called here.
Q. Was it during the month of August of '76?
A. It might have been.
Q. All right. Who else have you talked to about joining in the Class Action?
A. I talked to Lois Broadus.
Q. Is she a present employee of Blue Cross?
A. Yes.
Q. One of your former co-workers who you mentioned [195] previously?
A. Yes.
Q. And is she a black female?
A. Yes.
Q. And when is the last time you talked to Lois Broadus about possibly joining the Class Action?
A. Last Saturday morning—not Saturday past, but Saturday a week ago—that was on the 18th.
Q. The 18th of September?
A. 18th of September.
Q. Okay. Very briefly, what was the substance of that conversation?
A. Of trying to give the people, or the black females, their names and home phone numbers to discuss the Class—

Q. Did you ask her to do that for you?
A. —possible joining the Class.
Q. Did you ask—
A. Not for me. We do it in a joint effort.
Q. Well, did you ask her to do that on September 18, 1976?
A. Yes.
Q. And had you talked to her previously?
[196]) A. I had talked to her previously, yes.
Q. We will get into that tomorrow.
A. Okay.
Q. Anyone else you talked to about being a potential Class member?
A. May I confer with my attorney?
Q. No.

Mr. Cooper: Well, just to the best of your recollection.

By Mr. Friedman:

Q. Answer the question to the best of your recollection, if you can remember.
A. Well, it's not so much as remembering, but I don't want to cause anyone any problems as far as job is concerned.

Mr. Cooper: Answer the question, if you can.

A. (Continuing) There was one girl—I can't think of her last name—we see one another at the bus stop, one black—
Q. A black women?
A Yes.
Q. And what is her—
[197] A. Charlene is her first name.
Q. Is she a Blue Cross employee?

A. I can't think of her last name.
Q. Is there anybody else that you contacted or spoke with as being a potential Class member, that you can recollect at this time?
A. At this time, I can't remember.
Q. All right. You can't remember the stuff. We have, so far, then, Diane Bey, Joyce Lang, and Lois Broadus and a Charlene, who was an employee of Blue Cross, whose last name you can't recall?
A. I can't recall.
Q. Those are the four people who you discussed in the last four months or so, and possibly prior, which we haven't gotten into, abount joining as a Class member; is that correct?
A. Yes.

* * * * * * * *

VOLUME III—OCTOBER 1, 1976

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[91]Q. Do you want to add to the testimony somewhere?
A. Yes. At the meeting that I attended September 18 with the N.A.A.C.P., I had requested that they join in with me on the class action suit, and that's when they had to take it to the Board for me to wait for an answer.

Mr. Cooper: She just wanted to add that.

By Mr. Friedman:

Q. Thank you. And you haven't had an answer yet?
A. I'm expecting one by the first of the week. The Labor and Industry Committee chairman said that he would recommend that they join.

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VOLUME IV—October 5, 1976

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[71] husband?

A. I might talk to him twice. He works a different shift than I do.

Q. Who else did you talk to?

A. Occasionally I called my mother, occasionally an aunt.

Q. What's her name?

A. Pinky.

Q. Where does she live?

A. In Homewood.

Q. Does she have a last name?

A. Cox.

Q. Anyone else?

A. I have returned calls to people. They would call me. Miss Lane would call me.

Q. Who's that?

A. That's Joyce Lane that I had requested to join the class.

Q. You had requested Joyce Lane to enter?

A. From my home I had requested that. She had called me here at work to ask me to meet her for lunch, and I wasn't at work. When I got back, the note was on my desk that Miss Lane had called.

[72] Q. Is she a Blue Cross employee?

A. No. She works for another company, and I returned the call.

Q. What was the substance of your dealings with Miss Lane again?

A. My dealings?

Q. Your conversation with Miss Lane?

A. She wanted to know what time I was going to lunch; but when I got back, the thing was on the desk.

Q. What was the conversation that you had?

A. We didn't have any conversation. I told her what time I was going to lunch. She says it was too late.

Q. What did you talk to her at home about the class action?

A. About joining the class and see how many people she would get to join the class.

Q. And when did you do this?

A. I did this after I had filed my suit with Attorney Cooper.

Q. The present action, after the end of August of 1976?

A. Yes. This was later on after Attorney Cooper filed my charge.

[73] Q. After August of 1976?

A. Yes.

Q. In the month of September of 1976?

A. Yes, I talked to her.

Q. Is she a former employee?

A. She's a former employee.

Q. Of Blue Cross?

A. Yes.

Q. And you were asking whether or not she could get a number of people to join the class?

A. Yes.

Q. And what was the result of that conversation or conversations you had with Miss Lane?

A. She said that she would call several people that she knew had worked with Blue Cross.

Q. Any response to that since then?

A. I haven't talked to Joyce. I've been so busy in this.

Q. She's still trying to recruit additional class members?

A. I ran into one girl. She said she was talking about joining.
Q. You ran into one girl?
[74] A. A girl names Chamese.
Q. Is that S-h—
A. I don't know how you spell it?
Q. It sounds like S-h-m-e-s-e.
A. Yes.
Q. And that she had been a former employee of Blue Cross?
A. Yes.
Q. And you discussed her joining the class?
A. She had told me that Joyce had talked to her about the class and that Joyce was going to talk to her again.
Q. Any other results from Joyce's calls?
A. I haven't talked to Joyce, or I haven't talked to anyone.
Q. Other than Chamese?
A. Yes.
Q. All right. What other personal calls did you receive on a regular basis during the period of July '75 to the present?
A. No other calls on a regular basis.
Q. Did you ever make any other calls or personal calls on a regular basis?
[75] A. No, not on a regular basis.
Q. Well, what calls, what personal calls have you made that stand out in your mind at this time? To whom?
A. Yesterday Mr. Robert Pitts called me at home.
Q. He is from the N.A.A.C.P.?
A. Yes.
Q. I'm talking about while you're at work.

A. I'm trying to tell you, he called me at home; and my husband told him I was at work. He called me at work, and I returned his call, and I told him that I would have to talk to him later.
Q. Is that about the N.A.A.C.P. joining your class action?
A. No. We did not discuss anything on Blue Cross this time about that.
Q. By the way, is the N.A.A.C.P. joining this class action as far as you know?
A. As far as I know, yes.
Q. And Mr. Pitts told you?
A. I said as far as I know, yes.
Q. He did tell you that?
A. Yes.

* * * * * * * *

VOLUME VI—OCTOBER 11, 1976

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[115] A. There's one black female, June Pickett, who's been in the same position that she's currently in as a writer, I believe it is. She's been in that same position for, I would say, perhaps four years.
Q. How do you know that?
A. Because she was in that position when I was over in the Junior Achievement Building, and she's still currently in that position.
Q. Is she going to join your class?
A. I haven't asker her yet. I hope so.
Q. Any other facts to support your conclusion that blacks were not given an equal opportunity and a pattern was being established at Blue Cross of Western Pennsylvania as of the fall of 1974?
A. The fact that Diane Bey, who's joined my class, had indicated—

Q. Diane has joined your class?
A. Yes.
Q. When did Diane Bey join your class?
A. I can't remember when she joined it.
Q. What did she do to join it?
[116] A. Well, I would ask that she would join it, that she was with the Plan for 18 months.
Q. Is that in 1974?
A. No, I guess not.

Mr. Friedman: Mr. Cooper, I ask that you do not make any gestures.

Mr. Cooper: Sorry.

By Mr. Friedman:

Q. So that Diane Bey was not a reason or a fact in existence as to the time you filed your charges in the fall of 1974?
A. That's correct.
Q. Now, you say Diane Bey has joined your class. Is Diane Bey represented by Mr. Cooper also?
A. Yes, she is.
Q. And all she has done is indicate to you she was going to join your class?
A. Yes.
Q. And you don't remember when that was?
A. No.

* * * * * * * *

[154] Q. Now, you've testified you've spoken with Diane Bey; you've spoken with Joyce Lang.
A. Yes.
Q. And you've spoken with Lois Broadus to join your class?
A. Yes.

Q. And the three of them will join your class, to your knowledge?
A. As far as I know, they will.
Q. They've told you they would?
A. Yes.
[155] Q. And you've talked to them all since September 1, 1976?
A. Yes.
Q. Attempting to recruit them to join your class action. Is that correct?
A. Yes, and to recruit others to join.
Q. And for them to recruit others to join your class action?
A. Yes.
Q. You've also testified that you have spoken to the N.A.A.C.P. Is that correct?
A. Yes.
Q. Since September 1, 1976?
A. Yes.
Q. Attempting to enlist N.A.A.C.P. in joining your class?
A. Yes.
Q. And also in defraying litigation expenses, paying the cost of the suit. Is that correct?
A. To a certain extent.
Q. Did you ask them if they would pay the cost of your suit?
A. No, I did not. I have intentions of helping [156] to pay for my own suit. I'm not looking for anyone for a hand out.
Q. Is there anyone else, any other black person whom you asked to join your suit that hasn't been covered by my last line of questioning?
A. I talked to Joyce Deas and Marlene Ramsey last night.

Q. You did?
A. Yes.
Q. On the telephone?
A. Yes.
Q. And what did you—what was the substance of your conversation last night?
A. The substance of the conversation was the deposition that I'm going through and that I wanted them to join the class.
Q. And what did they say?
A. They said they would.
Q. Anyone else?
A. As of now, I haven't talked to anyone; but my intentions is to talk to other people.
Q. Would you please enumerate every person you intend to talk to join your class?
[157] A. I can't really name them all right now.
Q. Well, all the ones you know right now.
A. That I can think of?
Q. What people can you think of?
A. Well, Diana Bey.
Q. Diana Bey.
A. The N.A.A.C.P.
Q. N.A.A.C.P.?
A. I'm going to get in touch with N.O.W.
Q. That's National—
A. National Organization of Women.
Q. Yes.
A. I'm going to get in touch with the people in the Urban Crises.
Q. You said Lois.
A. A girl named Chamese, Judy Harris.
Q. Who's that?
A. She was a former employee. Joyce Lang, I've named her, Barbara Davis.

Q. And what was she?
A. Black.
Q. She didn't apply yet?
A. I don't know whether she did or not.
[158] Q. She is the one who called you on the telephone whom you told don't mention my name if you're going to apply to Blue Cross?
A. Yes. All the people that I had listed down there —my daughter, I'm going to ask her to join, Marcia Smith.
Q. Have you asked her yet?
A. Yes.
Q. So you've also asked your daughter to join your class?
A. Yes.
Q. When did you ask your daughter to join your class?
A. I asked her last week, I think. I talk to her almost every day.
Q. That's since the deposition started, you've asked her?
A. I might have talked to her before the deposition started.
Q. Who else do you intend to ask or have you asked?
A. I talked to so many people I can't remember all of them now.
[159] Q. There may be others?
A. Yes.
Q. Whom you intend to call?
A. Yes.
Q. And whom you've already called to join your class?
A. Yes. The director of action coalition.
Q. Who's that?
A. Charles Harris.
Q. Where are they located?

A. He works for Arco, and he has a program on WAMO.
Q. And what did you want them to do?
A. I want them to help me out on the class.
Q. Do you want them to help pay for it?
A. I want them to do whatever they possibly can. Advertisement or whatever they can to assist.
Q. Now, have you mentioned to your attorney that you were calling any of these people, Mr. Cooper?
A. I talked to him on some of them, not all of them. I haven't really had a chance to enumerate every one.
Q. Did you tell him that you called Diane Bey and [160] had lunch with her?
A. Yes, I told him that I had lunch with her.
Q. And did you tell him that you had asked Lcis Broadus to join your class?
A. Yes, I did.
Q. When did you tell him that?
A. I can't remember when I told him that.
Q. Was it since September 1 of 1976?
A. I can't remember.
Q. Did your attorney ever tell you not to call anyone?
A. No, he did not.
Q. Your attorney never told you not to call Diane Bey or Lois Broadus or the N.A.A.C.P. Is that correct?
A. I didn't know that I was restricted.
Q. Well, the answer is, he never told you. Is that correct?
A. No.
Q. He never told you. Is that correct?
A. Not to call people?
Q. Yes.
A. No, he never said not to call anyone.

Appendix H — Opinion and Order of the United States District Court for the Western District of Pennsylvania dated February 4, 1977

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALMA COLES,
Plaintiff,

vs.

BLUE CROSS OF WESTERN PENNSYLVANIA,
Defendant.

Civil Action No. 76-1097

OPINION

MARSH, Senior Judge

Plaintiff Alma Coles, a black woman, unsuccessfully sought a promotion from her employer, Blue Cross of Western Pennsylvania. Following receipt of a "Notice of Right to Sue" from the local office of the United States Equal Employment Opportunity Commission, plaintiff filed this action on August 27, 1976, alleging employment discrimination on the basis of race and sex. On behalf of herself and others similarly situated, plaintiff requested that the court advance this case on the docket for an early hearing, grant appropriate back pay and attorneys' fees, and issue a permanent injunction enjoining continued employment discrimination. On December 10, 1976, plaintiff filed a motion for

class action determination pursuant to Rule 23(b)(2), Fed.R.Civ.P. Following a continuance at the request of the plaintiff, an evidentiary hearing on the motion for class action determination was fixed for February 3, 1977 at 11:00 o'clock a.m.

At the hearing, plaintiff presented no evidence. Plaintiff argued that preliminary inquiries by the court were unnecessary and asserted that all of the requirements of Rule 23 had been met by the plaintiff's complaint.[1] We disagree.

While it is correct that a court need not inquire into the merits of the plaintiff's action in order to determine whether the suit may be maintained as a class action, it is equally true that an action is not maintainable as a class action merely because it is designated as such in the pleadings. The plaintiff has the burden of showing that she represents a class and that each of the requirements of Rule 23(a) has been met. *Davis v. Romney,* 490 F. 2d 1360, 1366 (3rd Cir. 1974).

Plaintiff's complaint, in both its original and amended versions, does little more than simply repeat the language of Rule 23(a). This is insufficient. There must be an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled. *Weathers v. Peters Realty Corporation,* 499 F. 2d 1197, 1200 (6th Cir. 1974).

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1. Counsel for the plaintiff stated that he had no specific facts or figures as to the existence of a continuing policy or practice of employment discrimination and that he would not have such information until he received answers to a set of interrogatories which were served after the court entered the order of January 20th fixing the hearing on the class action motion for February 3rd.

Plaintiff has alleged that the defendant employs at least 15 persons and has alleged that she represents a very broad class of past, present and future black and female employees as well as blacks and females who unsuccessfully applied for employment and blacks and females who would have applied for employment but who did not do so because of the defendant's alleged reputation in the community as an employer that discriminated on the basis of race and sex. However, plaintiff has made no showing that such a class would be so numerous that joinder of all members would be impracticable.[2] Likewise no showing has been made that the questions of fact involved are common to all members of the class who are similarly situated.

Plaintiffs has also failed to make any showing that she would not have interests antagonistic to the interests of other members of the broadly defined class, and thus the court cannot conclude that the plaintiff would fairly and adequately protect the interests of the class.

Thus, at the present time there is no basis in the record to support an order granting plaintiff's request for class action designation. Counsel for the defendant has offered to submit a brief on the class action issue and counsel for the plaintiff apparently desires additional time to prepare his case. However, it appears unnecessary to continue to delay a hearing on the employment discrimination claim of Mrs. Coles, particularly in light of the statutory requirement and her request that this court expedite such a hearing. 42 U.S.C. § 2000 e-5 (f). A final determination on the class action issue can

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2. At the hearing, counsel for the plaintiff did offer his estimate that the class could possibly exceed 18 or 26 members.

properly be postponed until after the hearing on Mrs. Coles' claim. Under § 2000 e-5 (g), the court is empowered to issue injunctive relief where it is appropriate to end discriminatory employment practices, whether or not the action has been maintained as a class action. Furthermore, as Judge Gibbons noted in *Katz v. Carte Blanche Corporation,* 496 F. 2d 747, 760 (3rd Cir. 1975), postponement of class action determination until the violation has been proved in no way prejudices the potential class members. In *Katz,* the court was dealing with a b(3) type class and alleged violations of the Truth in Lending Act, but the reasoning appears applicable to the instant case, particularly since due process does not require notice to absent members of a b(2) class. See *Wetzel v. Liberty Mutual Insurance Co.,* 508 F. 2d 239, 256-257 (3rd Cir. 1975). Delay of a final class action determination is also consistent with the intent of Rule 23 (c) (1).

Therefore, in light of the above and in light of the statutory requirement that this court expedite the hearing on the plaintiff's employment discrimination claim, the court will postpone final determination of the class action issue and will schedule a trial on the plaintiff's claim at the earliest possible date.

An appropriate order will be entered.

RABE MARSH
United States District Judge

February 4, 1977.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALMA COLES,
Plaintiff,

vs.

BLUE CROSS OF WESTERN PENNSYLVANIA,
Defendant.

Civil Action No. 76-1097

ORDER OF COURT

AND NOW, to-wit, this 4th day of February, 1977, a hearing having been held on February 3, 1977 on plaintiff's motion for class action determination, and the plaintiff having presented no evidence, and it appearing to the court that plaintiff has failed to meet the requirements of Rule 23(a), IT IS ORDERED that plaintiff's action will not be designated as a class action at this time.

IT IS FURTHER ORDERED that a final determination on the motion for class action designation be and the same hereby is postponed pending trial on plaintiff's claim of employment discrimination.

IT IS FURTHER ORDERED that the plaintiff's employment discrimination claim is hereby scheduled for Wednesday, February 23, 1977 at 10:30 a.m.

RABE MARSH
United States District Judge

Appendix I—Orders of the United States District Court for the Western District of Pennsylvania dated August 3, 1977 and September 6, 1977

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALMA COLES, Petitioner vs. HONORABLE RABE F. MARSH, United States District Judge, Nominal Respondent BLUE CROSS OF WESTERN PENNSYLVANIA, Respondent	Civil Action No. 76-1097 (Circuit Court No. 77-1235)

ORDER OF COURT

AND NOW, to-wit, this 3rd day of August, 1977, pursuant to writ of mandamus filed August 1, 1977, by the United States Court of Appeals for the Third Circuit, IT IS ORDERED, ADJUDGED AND DECREED that the order of this court under date of December 17, 1976, is hereby vacated.

RABE MARSH
United States District Judge

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALMA COLES, Plaintiff, vs. BLUE CROSS OF WESTERN PENNSYLVANIA, Defendant.	Civil Action No. 76-1097

ORDER OF COURT

AND NOW, to-wit, this 6th day of September, 1977, IT IS ORDERED that the order of this court dated August 3, 1977, be and the same hereby is vacated.

Pursuant to the writ of mandamus issued by the United States Court of Appeals on July 28, 1977 (No. 77-1235), IT IS ORDERED that the order of this court entered December 17, 1976, upon defendant's amended motion for a protective order be and the same hereby is vacated.

RABE MARSH
United States District Judge

Appendix J — Opinion of the United States Court of Appeals for the Second Circuit in Weight Watchers of Philadelphia, Inc. v. Weight Watchers, Int. Inc., 455 F.2d 770 (2d Cir. 1972)

WEIGHT WATCHERS OF PHILADELPHIA, INC.,
Plaintiff-Appellant,
v.
WEIGHT WATCHERS INTERNATIONAL, INC.,
Defendant-Appellee.
Docket 71-2158.

United States Court of Appeals, Second Circuit.

Argued Jan. 4, 1972.

Decided Jan. 20, 1972.

FRIENDLY, Chief Judge:

Defendant moves to dismiss, for want of appellate jurisdiction, an appeal by plaintiff from an order permitting the defendant to communicate, on terms stipulated by the district judge, with potential members of a class on whose behalf plaintiff seeks to maintain a class action. This is the latest but, we are sure, not the last case in which we must determine to what extent orders long antedating the final disposition of such suits are appealable.

The complaint, in the District Court for the Eastern District of New York, alleged that defendant is engaged in the business of maintaining a system of franchises, some 95 in number, in various parts of the United States to promote its standardized weight-reduction and weight-control programs and to resell various goods in connection therewith. Plaintiff holds the franchise for Philadelphia, Pennsylvania. The complaint alleged that defendant has imposed on plaintiff and other franchises maximum and, indeed, uniform prices, thereby causing damages of at least $15,000,000 to the class. Plaintiff asserted that the suit was maintainable as a class action under F.R.Civ.P. 23(b)(1), (2) and (3). In accordance with local court rules, the action was assigned to Judge Bruchhausen, since he had previously been assigned a somewhat similar action, except for the lack of class allegations, wherein two other franchisees, Bergen, Weight Watchers, Inc. and Weight Watchers of Hartford, Inc., sought large damages for alleged antitrust and other violations.

Shortly after the instant action was brought, Mr. Lippert, chairman of defendant's board of directors, sent a letter to all franchisees. This announced that defendant would vigorously defend both actions, that it was seeking evidence helpful to that end, and that, in its view, "Widespread publicity that any Franchisees claim that they preferred to charge more money to a highly sensitive obese population would surely have a detrimental effect on the image of WEIGHT WATCHERS." Later a similar letter was sent by defendant's president, Mrs. Nidetsch. These precipitated a motion by plaintiff asking the court to exercise its regulatory powers under F.R.Civ.P. 23(d) so as to restrain defendant from communicating with any member or potential member of the class concerning the action without prior approval of the court or of plaintiff's counsel, to direct defendant to send a letter of retraction in a form proposed by plaintiff, and to require defendant to file a report of any communications that had been had with members of the class. In Judge Bruchhausen's absence, this motion came on for hearing before Judge Costantino. The judge properly considered

his duty to be to take only such action as he believed to be immediately required to preserve the *status quo* with a view to enabling Judge Bruchhausen to resume control upon his return. Taking note of the Suggested Local Rule No. 7 in the Manual for Complex and Multidistrict Litigation, and the Sample Pretrial Order 15, he directed that both plaintiff and defendant be restrained from further communications without the consent and approval of the court, in the form stated in Sample Pretrial Order 15. He reserved plaintiff's other requests for decision by Judge Bruchhausen, save for directing the parties not to respond to any communications concerning the action except to acknowledge receipt and to make certain limited answers.

Upon Judge Bruchhausen's return, defendant moved for a modification of Judge Costantino's order. The court granted this. Its order provided that defendant might conduct discussions with franchisees concerning the subject matter of the action "in connection with contract negotiations requested in each instance by the franchisee" and incorporate any conclusion in any agreement resulting therefrom. This permission was subject to the conditions that counsel for the franchisee should be present at each negotiating session and review any new contract provision, that plaintiff's counsel should receive at least five days advance notice of the commencement of any such negotiations and of each negotiating session and be afforded full opportunity to express their views concerning the rights of the franchisees with respect to the subject-matter of the action, and that the last negotiating session with each franchisee prior to execution of a contract should be held at the offices of defendant's counsel in New York City—a location convenient to plaintiff's counsel.

Plaintiff's request for letters of retraction, which had been reserved by Judge Costantino, was denied. Plaintiff appealed from the order and moved for a stay. Upon defendant's announcing that it intended to move promptly to dismiss the appeal for want of appellate jurisdiction, the stay was granted.

(1) It is obvious that the order is not a "final decision" within 28 U.S.C. § 1291, in the ordinary sense of finally determining the rights of the plaintiff and the class it seeks to represent against the defendant. Indeed it makes no determination bearing upon these in the slightest degree. Plaintiff's case for appealability under § 1291 thus rests on the assertion that the order falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-547, 69 S.Ct. 1221, 1225-1226, 93 L.Ed. 1528 (1949). We have often indicated that *Cohen* must be kept within narrow bounds, lest this exception swallow the salutary "final judgment" rule. See Bancroft Nav. Co. v. Chadade S.S. Co., 349 F.2d 527, 529-530 (2 Cir. 1965); Donlon Industries, Inc. v. Forte, 402 F.2d 935, 937 (2 Cir. 1968); West v. Zurhorst, 425 F.2d 919 (2 Cir. 1970).

When we compare the order here sought to be appealed with others implicating *Cohen,* the inapplicability of that decision becomes clear. An order, like that of the district court in *Cohen,* which refused to apply a statute requiring an undertaking for costs by the plaintiff before the suit could be prosecuted, deprived the defendant

of the very benefit the legislature arguably intended to confer. *Per contra* an order requiring such an undertaking when the court allegedly had no power to do this, as in Fielding v. Allen, 181 F.2d 163 (2 Cir.), cert. denied, 340 U.S. 817, 71 S.Ct. 46, 95 L.Ed. 600 (1950), and Chabot v. Nat'l Securities & Research Corp., 290 F.2d 657 (2 Cir. 1961), might prevent a plaintiff from entering the courtroom door. The order here can have no such drastic consequences. Its maximum effect, and this is wholly speculative, would be to cause settlements by so many franchisees—a course long favored by the law, *cf.* Williams v. First Nat'l Bank, 216 U.S. 582, 595, 30 S.Ct. 441, 54 L.Ed. 625 (1910)—as to eliminate the numerosity which F.R.Civ.P. 23(a) (1) makes a prerequisite to a class action, leaving plaintiff nonetheless free to prosecute its own individual claim, as two other franchisees were already doing.

(2) Another important factor bearing on the application of the *Cohen* doctrine, which we mentioned in *Donlon, supra,* 402 F.2d at 937, is whether a decision will settle a point once and for all, as it did in the *Cohen* case, or will open the way for a flood of appeals concerning the propriety of a district court's ruling on the facts of a particular suit. This case is of the latter sort. Plaintiff's attempt to escape this conclusion by asserting that once a plaintiff brings a suit on behalf of a class, the court may never permit communications between the defendant and other members, even when, as here, both desire this, is in conflict not only with Suggested Local Rule No. 7 and Sample Pretrial Order 15, but with elementary considerations of common sense—and possibly, although we need not decide this, with command of higher au-

thority as well. Indeed, we are unable to perceive any legal theory that would endow a plaintiff who has brought what would have been a "spurious" class action under former Rule 23 with a right to prevent negotiation of settlements between the defendant and other potential members of the class who are of a mind to do this;[1] it is only the settlement of the class action itself without court approval that F.R.Civ.P. 23(e) prohibits. *Cf.* Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 320 (3 Cir. 1944) (Goodrich, J.) cert. denied, 325 U.S. 867, 65 S.Ct. 1404, 89 L.Ed. 1886 (1944).

(3) Defendant properly relies also on our decisions, last reviewed in Korn v. Franchard Corp., 443 F.2d 1301, 1304-1306 (2 Cir. 1971), that an order under F.R.Civ.P. 23(c) refusing designation as a class action is not appealable unless it rings "the death knell" on the named plaintiff's ability to prosecute his own claim, even though there may be members of the class whose claims would be too small to permit individual prosecution; it argues that if an order refusing class designation in this case would not have been appealable, the less serious action here taken cannot be. The *ad damnum* here alleged for the class and the fact that two other franchisees have felt able to proceed on their own, negate the possibility that successful negotiations with enough franchisees to eliminate the required numerosity for a class action, all of which is entirely speculative, would deprive plaintiff of its day in court. See Milberg v. Western Pacific R.R., 443 F.2d 1301, 1306-1307 (2 Cir. 1971), decided along with

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1. We do not here pass on the problem with respect to settlement that would exist when an action has been designated as a class action under F.R.Civ.P. 23(c) (1) and a member of the class has not requested exclusion under F.R.Civ.P. 23(c) (2).

Korn, holding the death knell doctrine inapplicable when the named plaintiff and her husband had claims of $8,500. Indeed, plaintiff makes no contention of practical inability to proceed on its own behalf; rather it would distinguish *Milberg,* Caceres v. Int'l Air Transport Ass'n, 422 F.2d 131 (2 Cir. 1970), and City of New York v. Int'l Pipe & Ceramics Corp., 410 F.2d 295 (2 Cir. 1969), on the ground that the propriety of an order refusing class action designation can be considered on an appeal from the final judgment, whereas there will never be another chance for appellate consideration of the order here sought to be appealed. But we have often held that mere inability to secure review of an interlocutory order on appeal from the final judgment does not warrant permitting immediate review of such orders. See Flegenheimer v. General Mills, Inc., 191 F.2d 237 (2 Cir. 1951); Bancroft Nav. Co. v. Chadale S.S. Co., *Supra,* 349 F.2d at 529-530; Donlon Industries, Inc. v. Forte, *supra;* West v. Zurhorst, *supra, cf.* Cushing v. Laird, 107 U.S. 69, 76, 2 S.Ct. 196, 27 L.Ed.2d 391 (1883). Congress has determined in its wisdom, and we think it was indeed wise, that some orders merely regulating the process of litigation can better be left to the unreviewable discretion of the district court rather than become the subject of appeal, whether from the interlocutory order or of the final judgment.

(4) A second string to plaintiff's bow is that Judge Bruchhausen's order modified an injunction previously granted by Judge Costantino and thus appealable under 28 U.S.C. § 1292(a) (1). This argument collides not only with the many decisions "that the mere presence of words of restraint or direction in an order that is only a step in an action does not make § 1292(a) (1) applicable," see cases cited in International Prods. Corp. v.

Koons, 325 F.2d 403, 406 (2 Cir. 1963), but also with our explicit decision there "to continue to read § 1292(a) (1) as relating to injunctions which give or aid in giving some or all of the substantive relief sought by a complaint . . . and not as including restraints or directions in orders concerning the conduct of the parties or their counsel, unrelated to the substantive issues in the action, while awaiting trial." Such a principle is peculiarly applicable in this case where the "injunction" was granted on an interim basis and expressly contemplated subsequent modification by the judge to whom the action had been assigned.

(5) Plaintiff responds with a claim that the International Products opinion was overruled *sub silentio* by its writer in Wolf v. Barkes, 348 F.2d 994, 995 (2 Cir.), cert. denied, 382 U.S. 941, 86 S.Ct. 395, 15 L.Ed.2d 351 (1965). There, with a mere reference to § 1292(a) (1), we took jurisdiction of an appeal from an order refusing to enjoin a corporation, which was a party to a stockholders' derivative action, from settling with certain defendants without compliance with what was then F.R.Civ. P. 23(c), now 23(e). The argument, while showing commendable diligence, is unsound. Apart from the fact that, as examination of the briefs confirms, the issue of appellate jurisdiction was not raised, the *Wolf* case is fairly distinguishable. So far as the settling defendants were concerned, the settlements there would destroy the claim plaintiffs had asserted on behalf of the corporation, leaving only a considerably less attractive claim that in making the settlements the directors had again breached their duty. The requested injunction was thus directed at preserving the substance of plaintiff's complaint from destruction by the corporation. Here, even if defendant should succeed in settling

with so many franchisees that the court will be forced to deny class action status, plaintiff's complaint will remain untouched. As we have, in essence, already noted, plaintiff has no legally protected right to sue on behalf of other franchisees who prefer to settle; F.R.Civ.P. 23(e), requiring court approval of the dismissal or compromise of a class action, does not bar non-approved settlements with individual members which have no effect upon the rights of others. Cf. Webster Eisenlohr, Inc. v. Kalodner, *supra*.

(6, 7) Plaintiff concludes with the standard request that if we hold the order unappealable, we should treat the appeal as a motion for leave to file a petition for *mandamus*. We make the standard response. We will so treat it, but will deny it, since the order was well within the wide range of discretion in the management of class actions necessarily accorded the district judge by F.R.Civ.P. 23(d). As said in Donlon Industries, Inc. v. Forte, *supra*, 402 F.2d at 937, "we do not —indeed may not— issue *mandamus* with respect to orders resting in the district court's discretion, save in most extraordinary circumstances not remotely presented here." See Will v. United States, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967); Pfizer, Inc. v. Lord, 449 F.2d 119 (2 Cir. 1971).

The motion to dismiss the appeal is granted. Treating the appeal as a request for leave to file a petition for mandamus, we deny it. We vacate the stay.

Appendix J-1 — Order of the United States District Court for the Eastern District of New York dated September 28, 1971, withdrawn September 28, 1971 and reinstated October 1, 1971

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

WEIGHT WATCHERS OF PHILADELPHIA, INC., on behalf of itself and members of the class similarly situated, Plaintiff, —against— WEIGHT WATCHERS INTERNATIONAL, INC. Defendant.	71 Civ. 1089 ORDER

Plaintiff having moved, by order to show cause dated September 9, 1971, for an order restraining defendant and others from communicating with members of the class upon whose behalf this action has been brought and other relief; the parties by stipulation of September 9, 1971 having agreed that neither the parties nor their counsel would communicate with any members of the class pending a hearing on the motion; the parties by stipulation dated September 13, 1971 (and "so ordered" by Judge Costantino on the same date) having agreed to further prohibit such communications with minor exceptions; Judge Costantino having stated from the bench on the return date that all communications between the parties and members of the class should be prohibited without prior approval of the

Court and that rulings on all other relief be deferred until Judge Bruchhausen, who has been assigned to the case, has returned from vacation; Judge Costantino having filed a memorandum and order dated September 23, 1971; and due deliberation having been had;

IT IS ORDERED that all parties hereto, their officers, directors, employees, agents, representatives and their counsel be, and hereby are, forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court, except any party or its counsel may respond to communications from any franchisee or its counsel by acknowledging receipt thereof and may accurately respond to a franchisee's inquiry as to the status of this action provided such responses are limited to a statement of the allegations in the complaint, defendant's answer and the existence of this order and the Court's memorandum and order dated September 23, 1971. Any proposed communication prohibited by this order shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to this action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to this action; (c) solicitation of requests by class members to opt out of

this action; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of this action and of any actual or potential Court orders, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or on the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order. This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business which do not have the effect of soliciting representation by counsel or to opt out of this action or misrepresenting the status, purposes or effect of the action and orders therein;

IT IS FURTHER ORDERED that the balance of plaintiff's motion be, and the same hereby is, respectfully referred to the Hon. Walter Bruchhausen, for decision; and

IT IS FURTHER ORDERED that the Motion Clerk be, and hereby is, directed to deliver all papers relating to this action to the Chambers of the Hon. Walter Bruchhausen.

MARK A. COSTANTINO
U.S.D.J.

Appendix J-2 — Order of the United States District Court for the Eastern District of New York dated December 14, 1971

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

WEIGHT WATCHERS OF PHILADELPHIA, INC., on behalf of itself and members of the class similarly situated, Plaintiff, —against— WEIGHT WATCHERS INTERNATIONAL, INC., Defendant.	71 Civ. 1089 ORDER

Defendant having moved, by motion dated November 5, 1971, for an order pursuant to the October 1, 1971 Order entered by Judge Costantino in this matter permitting it to engage in contract negotiations requested by certain franchisees which will encompass the subject matter of this action; and the Court having reviewed the submission of the parties and having heard argument thereon; and due deliberation having been had and a memorandum having been filed on December 6, 1971;

IT IS ORDERED:

A. That defendant may conduct discussions with franchisees concerning the subject matter of this action and such franchisees' rights with respect thereto, in connection with contract negotiations requested in each instance by the franchisee, and may incorporate any

conclusion thereon in any franchisee agreement or contract resulting from such negotiations, provided that (1) counsel for the franchisee shall be present during each meeting or other negotiating session between defendant and his client and shall review any provision concerning this litigation or its subject matter incorporated in any franchise agreement or contract resulting from such negotiations; (2) plaintiff and its counsel shall receive at least five days' advance notice of the commencement of such contract negotiations with each franchisee and of each negotiating session as to each franchisee and shall be afforded full opportunity to be present at each such negotiating session and to express their views concerning the rights of the franchisees solely with respect to the subject matter of this action; and (3) the last negotiating session with each franchisee prior to execution of a franchise contract shall be held at the offices of defendant's counsel in New York City.

B. That plaintiff's motion of September 9, 1971 requesting a direction from this Court ordering retraction of certain letters of defendant's officers dated August 30, 1971 and September 3, 1971 is in all respects denied.

Dated: Brooklyn, New York
December 14, 1971

s/ WALTER BRUCHHAUSEN
U.S.D.J.

Appendix K — Opinion of the United States District Court for the Eastern District of Louisiana in Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782 (E.D. La. 1977)

John S. WALDO, et al.

v.

LAKESHORE ESTATES, INC., et al.

Civ. A. No. 76-1082.

United States District Court,

E. D. Louisiana.

Feb. 15, 1977.

MEMORANDUM OPINION AND ORDER

BOYLE, District Judge:

This litigation stems from the purchase of a number of lots of real estate in the Lac Des Allemands Recreational Community of St. John's Parish, Louisiana, and, specifically, from factual misrepresentations and other irregularities said to have occurred in connection therewith. The named plaintiffs are six individual lot-purchasers and the Lac Des Allemands Property Owners Association, a non-profit corporation purporting to represent some 150 other persons who bought lots.

Plaintiffs proceed against various financing institutions as well as real estate agencies and agents alleged to have participated in the purchase transactions. Two of the six causes of action urged arise under federal statutory law, i. e., the Interstate Land Sales Full Disclosure Act (15 U.S.C. § 1701 *et seq.*) and the Securities Act of 1933 (15 U.S.C. § 77a *et seq.*). The remaining causes are state claims of securities law violations, recission based on fraud and/or mistake and redhibition.[1] The suit is brought as a class action, and the named plaintiffs have moved to maintain it as such on behalf of all persons who bought lots in the development under circumstances enabling them to pursue the causes of action set forth in the complaint, and specifically including those who made purchases relying in good faith upon the defendants' alleged misrepresentations. *See* Plaintiffs' Motion to Maintain Class Action [Rec.Doc. # 38].

Prior to the filing of the motion to certify, one of the defendants, Century National Bank, moved to dismiss the suit on the grounds of an alleged violation by plaintiffs and/or their counsel of Rule 2.12e of the rules of this court. The rule provides as follows:

* * * * *

2.12 Class Actions

e. In every potential and actual class action under Rule 23, F.R.Civ.P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of an approval of the communication by order of the court. Any such proposed communication shall be presented to the court in writing with a designation of or description of all addresses and with a motion and proposed order for prior approval by the court of the proposed communication and proposed addresses. The communications forbidden by this rule, include, but are not

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1. For present purposes, these claims are assumed cognizable under our pendent jurisdiction.

limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R. Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential court orders therein, or may create impressions tending, without cause, to reflect adversely on any party, any counsel, the court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Justice Department) which do not have the effect of soliciting representation by counsel or misrepresenting the status, purposes or effect of the action and orders therein. Nor does the rule forbid communications protected by a constitutional right. However, in such instances the person making the communication shall within five days after such

communication file with the court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

Century National contends that the minutes of a meeting conducted by the plaintiff organization on April 3, 1976, along with a written summarization of this lawsuit, were mailed to both members of the organization and non-members. *See* Minutes/Summary, attached as Appendix hereto. It argues that this mailing constituted an attempt to solicit and promote participation in the suit, contravening the directive of the local rule against any unapproved communication concerning an actual or intended class action by all parties thereto or counsel with actual or potential class members.

We referred the matter for hearing and report to United States Magistrate James D. Carriere as a Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure, instructing him to also make recommendations regarding what sanctions should be imposed in the event the rule was found to have been violated. *See* Order of Reference of July 22, 1976 [Rec.Doc. #43].[2] In a preliminary conference with the Magistrate, all parties agreed that further proceedings in this court — including, of course, our consideration of the certification ques-

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2. Following the entry of this order, plaintiffs moved to assert a violation of Rule 2.12e by the defendant Century National, and to include this allegation within the scope of the Special Master's investigation. The motion was referred for disposition to Magistrate Carriere, by whom it was granted. *See* Order of Reference of August 24, 1976 [Rec.Doc.#61]; Magistrate Carriere's Minute Entry of September 1, 1976 [Rec.Doc. #63].

tion — should be stayed pending the Master's report and recommendations. *See* Magistrate Carriere's Minute Entry of August 10, 1976 [Rec.Doc. #52]. Nonetheless, it has now become necessary for us to decide an issue raised herein without awaiting the outcome of the Special Master's investigation, for the plaintiffs have filed a motion to have Local Rule 2.12e declared invalid as violative of the First and Fifth Amendments to the Constitution and/or exceeding the court's statutory rule-making authority, and to have all proceedings relative to the alleged violations of the rule stayed pending a disposition of their motion.

(1-3) Since the instant motion was filed, no further proceedings have been scheduled before the Special Master. Considering the prayer for a stay thus mooted, we proceed to the issue of the local rule's validity. In so doing, the justiciability of that issue necessarily is acknowledged. A court acting in its adjudicative capacity may hear a challenge to the legitimacy of a rule it has promulgated pursuant to the quasi-legislative function of regulating the practice of law at bar. Moreover, such a challenge may be brought by one assertedly having violated the rule, and the rule may not stand if found to violate the constitutional or other substantive rights of the challenging party. *See In re Oliver*, 452 F.2d 111 (7 Cir. 1971).

In this regard, it also should be noted that Local Rule 2.12e does operate to limit the exercise of certain rights otherwise guaranteed by the First Amendment. Its application to the proceeding at hand restricts not only certain expressions by parties and counsel, but also impinges upon the constitutionally-derived interest of the recipient(s) to secure the communication. *See Procunier v. Martinez,* 416 U.S. 396, 408, 94 S.Ct. 1800, 1809, 40 L.Ed.2d 224 (1974).[3] Likewise limited by the rule's operation is the opportunity of the plaintiff organization to communicate concerning legal redress with those members who are not formal parties to the suit, which activity ordinarily would be entailed in the freedom of association and the collective right of an organizational membership to achieve effective judicial access. *See Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1969). Inasmuch as the rule's prohibition herein affects non-member recipients of communications as well, it aso has an impact upon their own individual rights to assemble and petition for redress of grievances.

(4-6) But it is beyond peradvanture that First Amendment freedoms are not absolute, and are properly limited pursuant to sufficiently important governmental interests. *See Theriault v. Carlson,* 495 F.2d 390, 394 (5 Cir.), *cert. denied,* 419 U.S. 1003, 95 S.Ct. 323, 42 L.Ed.2d 279 (1974). Constitutionally protected freedom of speech is "narrower than an unlimited license to talk," the jurisprudence on the one hand placing certain speech beyond the scope of the First Amendment and, on the other, regulating the unfettered exercise (as opposed to the actual content) of speech where justified by valid governmental policy. *See Konigsberg v. State Bar of California,* 366 U.S. 36, 50-51, 81 S.Ct. 997, 1006-07, 6 L.Ed.2d 105 (1961). In the latter category of cases, the authority of the Government to impose reasonable regulations as to the time, place and manner of First Amendment expression is considered axiomatic. *See Carlson v. Schles-*

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3. Without deciding, we assume for present purposes that movants have standing to assert these rights.

inger, 167 U.S.App.D.C. 325, 511 F.2d 1327, 1331 (1975) and cases cited therein.

(7-9) Thus, it is not sufficient to simply recognize the range of First Amendment rights which are affected by the enforcement of Rule 2.12e. Our task is to assay the interests served by the rule and weigh these against the deprivations of free speech, association and/or judicial access which necessarily accompany the rule's enforcement. The importance attached to these freedoms, however, requires that the governmental interests being weighed in balance be "compelling" and be furthered only by regulation drawn with "narrow specificity." *See N.A.A.C.P. v. Button,* 371 U.S. 415, 433, 438, 83 S.Ct. 328, 338, 341, 9 L.Ed.2d 405 (1963). The restriction of rights guaranteed by the First Amendment is only justified by "clear public interest, threatened not doubtfully or remotely but by clear and present danger." *See Thomas v. Collins,* 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430 (1945). The substantive "evil" at which regulation is directed must be "extremely serious" and the degree of its imminence "extremely high." *See Bridges v. State of California,* 314 U.S. 252, 263, 62 S.Ct. 190, 194, 86 L.Ed. 192 (1941).

(10) As a preliminary step in our analysis under these standards, we must consider whether Local Rule 2.12e constitutes a "prior restraint" on free expression, as that phrase traditionally has been construed to impose upon the prohibition so designated a "heavy presumption" against its validity. *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791, 2802, 49 L.Ed.2d 683 (1976) and cases cited therein. Guidance in this determination is provided by the Seventh Circuit decision in *Chicago Council of Lawyers v. Bauer,* 522 F.2d

242 (7 Cir. 1975), *cert. denied sub nom., Cunningham v. Chicago Council of Lawyers,* 427 U.S. 912, 96 S.Ct. 3201, 44 L.Ed.2d 1204 (1976). There, a First Amendment challenge was brought by certain attorneys to a local criminal rule of the District Court for the Northern District of Illinois and to a Disciplinary Rule of the American Bar Association's Code of Professional Responsibility, both forbidding them as lawyers from making extrajudicial, public comments on pending or imminent criminal proceedings which might interfere with a fair trial. The court noted that, despite the feature of punishment by contempt common to both "prior restraints" and the rules in question, there was a critical distinction to be made:

> Normally a 'prior restraint' constitutes a predetermined judicial prohibition restraining specified expression and it cannot be violated even through the judicial action is unconstitutional if opportunities for appeal existed and were ignored [citation omitted]. The validity of court rules, however, can be challenged by one prosecuted for violating them since we have held that there is a fundamental distinction in this regard between actions taken by the court in its legislative role and those taken in its adjudicative role [citation omitted].

Id. at 248. Accordingly, while aware of the need to scrutinize the rules more closely than it would a legislative restriction, the court declined to examine them with a "heavy presumption" against their validity. *See id.* at 248-49.

(11) We likewise perceive a distinction between the prohibition of Local Rule 2.12e and what is ordinarily regarded as a "prior restraint" on speech. To begin with,

the rule's general prohibition of unauthorized communication is coupled with a proviso which, in our view, allows such expression as is assertedly protected by the First Amendment to be made free of prior restraint by the court. *See* p. 792, *infra*. Furthermore, as in the *Bauer* case, a violation of this rule does not *per se* entail immediate or irreversible punishment, by contempt or otherwise. The instant motion itself indicates that the rule's validity may be challenged by one charged with violating its provisions. Nor would the opportunity to bring such a challenge be foreclosed were a violation already established. Our inquiry, then, does not proceed on the basis of the local rule's assumed constitutional infirmity as a "prior restraint."[4]

(12) Rule 2.12e is drawn *verbatim* from a "suggested local rule" in the Manual for Complex Litigation, a publication designed to facilitate procedures for the handling of class actions and other complex matters. *See* Appendix to Part 2, § 1.41, Manual for Complex Litigation, at p. 145 (1973 ed.) [hereinafter Manual].[5] The

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4. A different conclusion would not necessarily be dispositive, since any such presumption is rebuttable. Capacity for, or the extent of, the "target evil" may in some cases warrant regulation which consists of a prior restraint of speech. *See Times Film Corporation v. City of Chicago,* 365 U.S. 43, 47-49, 81 S.Ct. 391, 393-95, 5 L.Ed.2d 403 (1961).

5. The draft of a revised version of the Manual recently was circulated among all federal judges, but it appears that the language of the suggested rule will remain unchanged in the new edition. *See* Appendix to Part II, § 1.41, Tentative Draft of Fourth Revision of Manual for Complex Litigation with Revisions to July 21, 1976, at pp. 188-189 [hereinafter Draft Manual].

We note that other district courts likewise have adopted the proposal of the Manual by enacting local

Manual itself, then, is an appropriate reference to the potential abuses of the class action procedure which Rule 2.12e purports to eliminate: solicitation of legal representation and/or fund contributions directed to those not formal parties to the action, solicitation of opting out of the class under Rule 23(b)(3) of the Federal Rules of Civil Procedure and misrepresentation of the status, purpose or effect of the action. *See* Manual, at p. 22.

(13, 14) Considering first the possible solicitation of representation and/or funds, we regard regulation aimed at preventing such an abuse as promotive of both the public's and the legal profession's interests. Not only does curbing solicitation by less than scrupulous attorneys serve those laymen liable to be unfairly badgered and/or persuaded by the activity, but it also protects the reputation and professional image of the bar itself. The local rule expressly states that its prohibitions are separate from and in addition to ethical obligations; but furtherance of the same public and professional interests is the aim of those disciplinary rules enacted by the state and national bar associations which prohibit advertising and solicitation.[6] The need to balance regulatory measures in this area against First Amendment guarantees

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rules prohibiting unapproved communications to class members by the parties or counsel in the action. *See* Note, "Development in the Law—Class Actions," 89 *Harv. L.Rev.* 1318, 1597 n.81 (1976).

6. The Louisiana State Bar Association and the American Bar Association each has enacted a Code of Professional Responsibility virtually identical to the other in the treatment of professional solicitation and advertising. Thus, both codes contain a disciplinary rule generally prohibiting a lawyer from publicizing himself, or allowing himself to be publicized, as one offering legal services. *See* DR 2-101(B), ABA Code of Professional

continues to be the subject of judicial scrutiny, as it remains true that the Government cannot invoke its power to regulate the professional conduct of its attorneys at the expense of the individual's free expression or the public's right to fair legal representation. *See N.A.A.C.P. v. Button, supra,* 83 S.Ct. at 341; *Brotherhood of Railroad Trainmen v. Virginia, supra,* 84 S.Ct. at 1117.[7] But

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Responsibility; DR 2-101(B), La.State Bar Ass'n Code of Professional Responsibility [Art. 16, La. St. Bar Ass'n Articles of Incorp., LSA-R.S. 37, ch. 4 App.]. Both also set forth rules prohibiting an attorney from recommending his employment as a private practitioner to one who has not sought out his services, from requesting a person or organization to recommend the use of his services as a private practitioner, or from knowingly assisting a person or organization that pays others to promote the use of his services. *See* DR 2-103(A), (C) & (D), ABA Code of Professional Responsibility; DR 2-103(A), (C) & (D), La. State Bar Ass'n Code of Professional Responsibility [*id.*]. Finally, both codes forbid a lawyer who has solicited business from accepting employment as a result thereof. *See* DR 2-104(A), ABA Code of Professional Responsibility; DR 2-104(A), La. State Bar Ass'n Code of Professional Responsibility [*id.*].

The state goes one step beyond ethical sanctions to enforce its policy against solicitation. Louisiana statutory law prohibits any person or business from soliciting employment for a legal practitioner, and imposes criminal penalties (fine or imprisonment) for violations. *See* LSA-R.S. 37:213.

7. Last October, the United States Supreme Court granted review of a decision by the Arizona Supreme Court that Disciplinary Rule 2-101(B) of the ABA Code of Professional Responsibility (*see* note 6, *supra*), prohibiting the advertising of services by attorneys, does not violate the First Amendment. *See Bates v. Arizona State Bar,* 429 U.S. 813, 97 S.Ct. 53, 50 L.Ed.2d 73 (1976). *See also* "Supreme Court Will Hear Lawyers' Advertising Case from Arizona," *ABA Journal,* vol. 62, at 1422 (Nov. 1976).

such traditional self-governance by the bar, both nationally and locally, reflects its own judgment that the service of professional and public interests outweighs the resulting restriction of free expression.

Local Rule 2.12e is at least in part prompted by the same appraisal. It is one we find all the more compelling in the class action framework, given the heightened susceptibilities of nonparty class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to "drum up" participation in the proceeding. Moreover, it is likely that uninvited and unapproved communications to this effect "may appear [to the party solicited] to be an authorized activity approved by the court, simply by reference to the title of the court, the style of the action, the name of the judge, and to official processes." *See* Manual at 22.

(15-17) An additional interest affecting the court becomes relevant in considering the potential solicitations of counsel or parties which invite other parties to opt out of a proceeding maintained as a class action under Federal Rule 23(b)(3). Rule 23 expressly provides that, once a 23(b)(3) class action has been allowed to proceed, it remains the special province and responsibility of the court to direct the "best notice practicable" to class members, advising them of their privilege to exclude themselves from the class. *See* Rule 23(c)(2), Fed.R.Civ.Pro. In this way will individual interests be safeguarded by the court in the context of a proceeding intending to have common claims adjudicated; and, with the opportunity to opt out upon receiving proper notice, individuals may avoid being bound by a class-wide judgment that otherwise would preclude them from litigating their claims separately. The Ad-

visory Committee Notes which accompany Rule 23 indicate that this court-directed notice of the opportunity to opt out purports to fulfill the requirements of Due Process. *See* Notes of the Advisory Committee following Fed.R.Civ.Pro. 23, at 302, Title 28, U.S. Code. Unauthorized notice issuing from counsel or parties to the action usurps the authority of the court to enforce such fundamental requirements and the policy of Rule 23. Considering the possible confusion resulting from notice that is less than complete in its terms, and the possible prejudice caused by notice less than accurate in its representations, effective management of the judicial process may be directly jeopardized. It is well-settled that courts may reasonably protect the integrity of their proceedings by limiting activities ordinarily protected by the First Amendment. *See Dorfman v. Meiszner,* 430 F.2d 558, 561 (7 Cir. 1970). *See also Polk v. State Bar of Texas,* 374 F.Supp. 784, 788 (N.D.Tex.1974).

(18) Unapproved communications to class members that misrepresent the status or effect of the pending action also have an obvious potential for confusion and/or adversely affecting the administration of justice.[8] Particularly should such communications seem vested with official authority, there arises not only the risk of sub-

8. In the case at bar, we note that the minutes of the plaintiff organization contain several patent misrepresentations of the suit's status and effect. The minutes, purporting to be of a meeting held on April 3, 1976, state the suit was filed on April 5, 1976. In fact, the action was filed on April 7. Moreover, declarations are made to the effect that there is an "overwhelming" possibility the plaintiffs will prevail and that the contingency fee arrangement is only made by "attorneys who are certain to win. . . ." *See* Minutes/Summary, attached as Appendix hereto.

sequent disenchantment with the judicial process, but also the danger that individuals will be induced to act to their detriment in reliance upon misinformation and/or falsehoods. Thus entailed in this abuse is something more than a general interest in orderly process which is shared by the court and the public; there is the added interest of the individual in achieving a full and fair judicial remedy. To this extent, it is important to recognize the need for restricting free expression where such presents a "reasonable likelihood" of endangering the individual's constitutional guarantee of a fair trial. *See* Manual, at 22 n.28.

(19) Our conclusion that a sufficiently important objective is served by Local Rule 2.12e does not rest upon cognizance of the dangers of solicitation alone,[9] or of improper class notice alone, or of misrepresentations alone. It is all such abuses, considered together and viewed in the context of the unique class action procedure, which contribute to the finding that this local rule effectuates a compelling and substantial governmental interest, one rooted in the judiciary, the bar and the public at large. Furthermore, we are satisfied that the potential ills cited in the Manual for Complex Litigation are far from remote or theoretical. The documented experiences of other courts justify a finding that the incidence of abuse in the class action setting is unfortunately high. *See* Manual, at 24-25; Draft Manual, at 40-44.

9. Broad regulatory prohibitions aimed at preventing such evils of improper solicitation as "barratry, maintenance and champerty" have been stricken down by the Supreme Court as overly-restrictive of First Amendment freedoms. *See N.A.A.C.P. v. Button, supra,* 83 S.Ct. at 340-344. We consider our local rule as addressing a far more inclusive range of abuses.

(20, 21) Yet, governmental regulation — even in the pursuit of important objectives — must not unnecessarily restrict constitutionally protected activity or ignore other reasonable approaches which are available to achieve the same goals without burdening such activity. *See Dunn v. Blumstein,* 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972). It thus remains for us to determine whether freedoms protected under the First Amendment are needlessly restrained by the operation of Rule 2.12e. In order to comport with the due process requirement of the Fifth Amendment, the local rule may not "sweep unnecessarily broadly," and must be viewed in the light of "less drastic means for achieving the same basic purpose." *See Aptheker v. Secretary of State,* 378 U.S. 500, 508, 84 S.Ct. 1659, 1665, 12 L.Ed.2d 992 (1964); *Chicago Council of Lawyers v. Bauer,* supra, at 249.

(22) The plaintiffs observe that the first portion of the rule flatly prohibits *all* unauthorized communications, and that the succeeding listing of four potential abuses *via* such communications does not limit the scope of the prohibition, the list being illustrative only and not intended as exhaustive. We find no merit, however, in the suggestion that specifically listed abuses ought be matched with specific prohibitory rules, as opposed to an across-the-board restriction. As a practical matter, it is extremely dubious that the local rule could be drafted so as to exhaustively define potential abuses of the class action device through unauthorized communication with class members. Unfortunately, the ingenuity of those determined to wrongly take advantage of the class action procedure would likely prevail over any such attempt at prohibition by itemization. The end result would be instances of compliance with the letter of the

rule even as the spirit of effective regulation was flouted. Albeit "less drastic," therefore, this approach fails to accomplish the same basic purpose as does the rule in its present form.[10]

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10. One commentator has suggested other alternatives to a general prohibition such as Rule 2.12e. *See* Note, "Developments in the Law — Class Actions," supra.

On the one hand, it is proposed the court allow direct communication between the class and the class opponent, thus checking the possible abuses of misrepresentations made by the plaintiff side concerning the prospects of the action. *See id.* at 1598-99. Aside from the fact that the problems of solicitation and advertising would persist, this recommendation appears plagued by practical problems far greater than those encountered in the present approach. The same commentator himself acknowledges that the traditional rule requiring communication with the opposing litigant only through the latter's attorney would be contravened. *See id.* at 1599-1600. The evils which this rule purports to avoid — e. g., the undue influencing of unsophisticated litigants — would be exacerbated in a class proceeding, and would be visited upon the very persons the local rule seeks to protect.

A second suggestion advanced is to require the filing of the intended communication with both the court and the opponent prior to dissemination, thus allowing the court to screen the filings and restrain in advance all that are blatantly abusive while directing corrective communications where the abuse is established after the fact. *See id.* at 1601-02. However, the introduction of even the most limited screening process would burden the court further in its handling of a complex matter, and would only serve to effect a "prior approval" mechanism not significantly less drastic than the one which Local Rule 2.12e allows. Common sense would seem to favor the existing requirement that, with a few specific exceptions, all intended communications be submitted to the court and dependent upon its approval prior to

(23) We further note that the general directive of Rule 2.12e subjecting all communications to prior court approval is not unqualified. The rule's second paragraph sets forth two exceptions: communications between an attorney and one who has initiated contact with him concerning the employment of his services, and communications in the course of the business of a public office or agency which do not have the effect of solicitation or misrepresentation. The latter language properly recognizes that communications such as those emanating from attorneys general or other legal officials should be presumed servient of the public interest rather than potentially abusive of a pending class action. *See* Manual, at 23. To extend the general prohibition of the rule into this area, then, would give 2.12e too wide a sweep. The first exception, even broader in its application, leaves unaffected discourse between an attorney and either his actual client or one who has himself sought legal counsel. Thus, the rule safeguards the exercise of First Amendment freedoms in those cases where the attorney's need to solicit and/or advertise is obviated, and where possible misrepresentation of the litigation is a matter relegated to the framework of an existing attorney-client relationship or to the client-initiated process of arms-length bargaining for legal services.

(24) The scope of Rule 2.12e is narrowed still further by the express provision that it does not forbid "communications protected by a constitutional right,"

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dissemination, rather than a requirement that the court immediately screen out communications it deems clearly abusive or else allow them to be sent out. Moreover, in the latter situation, it is hardly certain that "corrective communications" ordered by the court would undo the ill effects of an earlier abuse.

and that, in such instances, it is required that the communicator within five days file a copy or summarization thereof with the court. Despite the plaintiff's argument that such a provision is meaningless since the "chilling effect" of 2.12e survives, the language is quite significant insofar as it serves to limit the need for prior authorization under the rule. We interpret the provision as allowing the possibility that a party will engage in what he considers constitutionally-protected activity without seeking the prior approval of the court. As is indicated by a pre-trial order entered in a class suit in the United States District Court for the Western District of Missouri, it would be entirely consistent with the Manual rule for the court to direct a procedure whereby a party or counsel can assert a First Amendment right to communicate with the class without any prior restraint, and then do so on the condition he files the communication with the court. *See* Draft Manual, at 38 n.33, 189-90. Pursuant to this construction of Rule 2.12e, we conclude that the risk of its regulatory scope being unconstitutionally overbroad is effectively eliminated.

Our conclusion is not altered by the plaintiffs' reference to the decision in *Rodgers v. United States Steel Corporation,* 508 F.2d 152 (3 Cir.), *cert. denied,* 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975). There challenged both on constitutional grounds and on the theory it exceeded the court's rule-making authority was Local Rule 34(d) of the Western District of Pennsylvania, prohibiting any communication by any parties or counsel with an actual or potential class member unless the communication first was approved by the court. Only in the process of skirting the constitutional questions and establishing a statutory basis for its conclusion that the rule

was invalid, did the majority opinion note a "serious constitutional issue of overbreadth. . . ." *Id.* at 163-64. But even aside from the fact that such an observation is dicta in its decision, the court was careful to distinguish Local Rule 34(d) from the proposed rule in the Manual for Complex Litigation. It was noted that, since the local rule before it contained neither the illustrative list of abuses nor the limiting exceptions found in the Manual rule, there was no occasion for the court to consider whether a rule drafted according to the Manual's proposal would cure the problem of overbreadth. *See id.* at 164 n.18.[11] Moreover, we would agree with the concurring opinion of Judge Weis that the purpose of the Manual's proposed rule broadly prohibiting all communication is itself broad. The objective is not simply to battle barratry, but to prevent other abuses of the class action device as well. *See id.* at 166.

(25, 26) We may dispose briefly of the additional contention that 2.12 also runs afoul of the Fifth Amendment due to vagueness. The local rule, like any law, must be drafted so that a person of ordinary intelligence is given a reasonable opportunity to know what is prohibited, and to act accordingly, particularly where a law that is vague operates to inhibit the exercise of First Amendment rights. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). But Rule 2.12e satisfies this requirement. There should be no confusion in ascertaining the meaning of its reference to "potential" as well as "actual" class actions, since this clearly contemplates the post-certification as well as pre-certification operation of the rule. Equally clear from a common-sense reading of the first sentence are the terms extending coverage to "all parties" to the action, forbidding communication with any class member not a "formal party" and forbidding communication "directly or indirectly." Reasonably clear notice also is accomplished by the specific prohibition of certain "solicitation," by the exemption of communications with a "client or a prospective client" and by the reference back to all previously mentioned exceptions in imposing the requirement that excepted communications be filed with the court.

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11. Going even further, the concurring opinion of Judge Weis averred that the district court would not be foreclosed from enacting a rule similar to the Manual rule. *See id.* at 166.

The second and non-constitutional ground of attack on the validity of Rule 2.12e is that its promulgation exceeds the rule-making authority of the district court. In finding the local rule before it invalid for this reason, the majority in *Rodgers v. United States Steel Corporation,* supra, noted that both statutory sources of the lower court's rule-making power — i. e., Rule 83 of the Federal Rules of Civil Procedure and Section 2071 of the United States Code, Title 28 — require that rules enacted not be inconsistent with the Federal Rules of Civil Procedure. *See* 508 F.2d at 163; Rule 83, F.R.Civ.Pro.; 28 U.S.C. § 2071. Confining its attention to the pre-certification application of the local rule only, the *Rodgers* court held that a prohibition of all unapproved communications involving plaintiffs or their attorneys — even when such communication seeks to encourage common participation in a class suit — was not consistent with the policy of the federal rules favoring the disposition of class claims in a single litigation where feasible. *See id.* at 163-64.

(27-29) However, we categorically oppose the notion that a policy allowing unfettered communication to encourage participation in a class suit is consistent with the purpose of Federal Rule 23. The potential abuses attendant upon such unregulated communication clearly undermine the efficacy of the class action device. By proscribing such communications as tend to solicit legal services and/or fund contributions, the rule protects the right of the class membership to judicial redress that is not unnecessarily burdened. By foreclosing unapproved notices of the right to opt out and preventing misrepresentations of the lawsuit's status, purpose or effect, the membership's entitlement to a fair trial is safeguard. The local rule also comports with the intention of the federal class action rule that there be district court control over the sending of notices to members of the class. *See* 7A Wright & Miller, Federal Practice and Procedure: Civil § 1797, at 239. We therefore regard Local Rule 2.12e as entirely consistent with and in furtherance of the purpose of fully and fairly disposing of class-wide claims and remedying class-wide grievances in a single proceeding.

For the foregoing reasons, the plaintiffs' motion to invalidate Local Rule 2.12e and stay the proceedings before the Special Master relative to the alleged violations of the rule should be, and it is hereby, *DENIED*. The Special Master shall proceed to investigate the matter of the alleged violations pursuant to our earlier orders.

Supreme Court, U. S.
FILED
OCT 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-544

BLUE CROSS OF WESTERN PENNSYLVANIA,
a non-profit Corporation,
Petitioner
v.
HONORABLE RABE F. MARSH,
United States District Judge,
Nominal Respondent
(ALMA COLES, an individual),
Real Party In Interest-Respondent

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Pursuant to Rule 24(5) of Rules of the Supreme Court of the United States, Petitioner, Blue Cross of Western Pennsylvania, hereby supplements its Petition for Writ of Certiorari and appends excerpts from the Order of District Judge Muir of the United States District Court for the Middle District of Pennsylvania in *In re Anthracite Coal Antitrust Litigation* dated and filed September 30, 1977 as Appendix L. The Petitioner calls attention to this new authority, not available at the time of last filing, since it illustrates the importance of this issue in the conduct of class actions under the Federal

Rules of Civil Procedure and the desire of federal district courts to enter such orders, notwithstanding the decision by the Third Circuit in *Coles v. Marsh,* sought to be reviewed by the Petition for Writ of Certiorari filed herein.

Respectfully submitted,

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Blue Cross of Western Pennsylvania

Appendix L—Excerpts from Order of the United States District Court for the Middle District of Pennsylvania in In re Anthracite Coal Antitrust Litigation, dated and filed September 30, 1977.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE ANTHRACITE COAL ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: ALL ACTIONS	MASTER FILE NO. MDL 293

ORDER

September 30, 1977

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On September 26, 1977, 29 attorneys representing the various parties met with the Court in the first pre-trial conference. At that conference, certain agreements were entered into by the parties and certain oral orders issued by the Court. The purpose of this Order is to reduce such oral agreements and oral orders to writing and in addition to make certain modest changes in the suggested pre-trial Order No. 4 submitted by all parties to the Court. The provisions contained in §12.5 of this Order have been agreed to by the parties notwithstanding Coles vs. Marsh,——F.2d——(3d Cir. July 28, 1977).

NOW, THEREFORE, IT IS ORDERED THAT:

* * *

12.5 In these coordinated actions, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such actions with any potential or actual class member not a formal party to these coordinated actions without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P. and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this Order are not exclusive. All other ethical, legal, and equitable obligations are unaffected by this Order. This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or

(2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as that of the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein. If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication, if oral.

Supreme Court, U. S.
FILED
NOV 15 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-544

BLUE CROSS OF WESTERN PENNSYLVANIA,
a non-profit Corporation,
Petitioner

v.

HONORABLE RABE F. MARSH,
United States District Judge,
Nominal Respondent
(ALMA COLES, an individual),
Real Party In Interest-Respondent

BRIEF IN OPPOSITION

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ALMA L. COLES

STATEMENT OF THE CASE

I. Proceedings in the District Court

On August 27, 1976 Respondent Alma Coles filed in the United States District Court for the Western District of Pennsylvania a complaint for injunctive relief, back pay, and damages which was captioned, "Alma Coles v. Blue Cross of Western Pennsylvania, Civil Action No. 76-1097. The complaint alleged discriminatory employment practices in violation of 42 U.S.C. §2000e, Title VII of the Civil Rights Act of 1964 as amended. The action was sought to be maintained as a Class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of plaintiff and an unspecified number of persons.

Respondent's counsel engaged in extensive and difficult investigation to prepare and present motions, counter-motions, answers, interrogatories and depositions. Blue Cross was uncooperative and evasive, with the district court's sanctions, in responding to Respondent's discovery efforts.

On December 17, 1976 plaintiff and plaintiff's counsel (now Respondent and Respondent's Counsel) were forbidden during the investigation and preparation of this case; from communicating "directly or indirectly, orally or in writing," with any* members of the Class (actual or potential), several named individuals and organizations and anyone with a propensity to dispose themselves concerning this case. The prohibition on communications, in this case, resulted from the invoking of Rules 83 and 23 of the Federal Rules of Civil Procedure, not unlike those in Rodgers v. United States Steel, 508 F.2d 152 (1975 3rd Cir.) cert denied, 423 U.S. 832 (1975).

* emphasis added

The ability of respondent's attorney to adequately proceed with the investigation and preparation of the case was sharply curtailed by the Order of Court prohibiting communications.

On January 27, 1977 respondent's attorney filed a motion in the district court requesting that a Class determination hearing be postponed until discovery could be completed and reviewed. The district court denied plaintiff's motion and had a hearing on February 3, 1977.

On February 3, 1977, the district court orally set trial for February 4, 1977. This Order was subsequently changed to February 23, 1977 after the Court was informed of respondent's illness and that an appeal was being undertaken to the United States Court of Appeals for the Third Circuit because of the severe prejudice resulting to plaintiff as a result of the Order of Court prohibiting communications and the Court's denial of plaintiff's request for extension of time to make discovery.

II. Proceedings in the Court of Appeals

After filing of briefs and oral argument, the United States Court of Appeals, on July 28, 1977, issued a Writ of Mandamus directing the district court to vacate the Protective Order citing as reasons therefore:

1) Rule 83 does not empower the district court to prohibit communications at a time prior to the Class determination for the purpose of preventing the recruitment of additional parties by the plaintiff or of the solicitation of financial or other support to maintain the action ___F.2d___ (Petitioner's Writ Appendix C, p. 12a).

2) To the extent that the district court is empowered under Rule 83 to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened ___F.2d___ (Petitioner's Writ Appendix C, p.12a).

3) The district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23, ___F.2d___, Petitioner's Writ, Appendix C, p. 12 and 13a.

Reasons For Denying The Writ

I. THERE IS NO REAL CONFLICT OF DECISIONS OF THE COURT OF APPEALS

The decision of Chief Justice Seitz fosters the purposes of Rule 23 by labeling the conduct of respondent as encouraging common participation in the litigation of her sex/race discrimination claim and went on to say, "The activities were not abuses of the Class Action device...." ___F.2d___ (Petitioner's Writ, Appendix C, p. 11a. Chief Justice Friendly also sought to foster communication in Weight Watchers of Philadelphia v. Weight Watchers International 455 F.2d 770 in approving negotiations with potential Class members who are of a mind to reach a settlement prior to Class certification. It is only the settlement of the Class Action itself without Court approval that violates Federal Rules of Civil Procedure 23(e).

However, it may be a mischaracterization of the dicta in the Weight Watchers opinion to say it stood for anything other than the ruling of Judge Bruchhausen, was not appealable and would not be appropriate for mandamus. For Petitioner here to ascertain that Chief Judge Friendly's Opinion stood for more is without basis.

II. THE DISTRICT COURT'S RULING VIOLATES THE FIRST AMENDMENT

The December 17, 1976 Order of Court was an prior restraint of free speech, moreover, the Order flatly and broadly prohibited all communications and associational activities, however lawful or innocuous as between respondent and persons as set forth in the District Court's Order of December 17, 1976. Any prior restraints on communications have been held by the Supreme Court, Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) at 419 to carry, "a heavy presumption against its constitutional validity" and the court has "a heavy burden of showing a justification" therefore. The district court put forth no justification for the prior restraint imposed in this case. The Supreme Court has maintained the established principle that prior restraints on First Amendment Rights are justified only where there exists "an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." Craig v. Harney, 331 U.S. 252 (1941) at 376.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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